Sunshine Act Meetings

Federal Register
Vol. 57, No. 205
Thursday, October 22, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10:00 a.m. on Tuesday, October 27, 1992, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous meetings.

Reports of actions approved by the standing committees of the Corporation and by officers of the Corporation pursuant to authority delegated by the Board of Directors.

Discussion Agenda:

Memorandum and resolution re: Proposed amendments to Part 353 of the Corporation's rules and regulations, entitled "Reports of Apparent Crimes Affecting Insured Nonmember Banks," which would implement new procedures for completion and submission of the uniform multi-agency criminal referral form designed to facilitate financial institutions' compliance with criminal activity reporting requirements and enhance law enforcement agencies' ability to investigate the matters reported in criminal referrals.

Memorandum and resolution re: Final amendments to the Corporation's rules and regulations in the form of a new Part 362, entitled "Activities and Investments of Insured State Banks," which prohibit insured state banks, subject to certain exceptions, from making equity investments of a type, or in an amount, that are not permissible for a national bank.

Memorandum and resolution re: Final amendment to Part 333 of the Corporation's rules and regulations, entitled "Extension of Corporate Powers," which eliminates current language applying certain prohibitions concerning equity investments by savings associations to state banks that are members of the Savings Association Insurance Fund, with such banks thereafter to be subject to the restrictions of Part 362.

Memorandum and resolution re: Final amendments to the Corporation's rules and regulations in the form of a new Part 365, entitled "Real Estate Lending Standards," which would implement section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991 by requiring insured State nonmember banks to adopt real estate loan policies which are prudent and which take into consideration the suggested maximum loan-to-value ratios and exception standards contained in guidelines issued by the Corporation.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550–17th Street, NW., Washington, DC.

The FDIC will provide attendees with auxiliary aids (e.g., sign language interpretation) required for this meeting. Those attendees needing such assistance should contact Llauger Valentin, Equal Employment Opportunity Manager, at (202) 898–6745 (Voice); (202) 898–3509 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898–6757.

Dated: October 20, 1992.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 92–25794 Filed 10–20–92; 2:41 pm]

BILLING CODE 6714-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:30 a.m. on Tuesday, October 27, 1992, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors, pursuant to sections 552b(c)(2), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of Title 5, United States Code, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings (cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal of proceedings, or assessment of civil money penalties) against certain insured depository institutions or officers, directors, employees, agents or other persons participating in the conduct of the affairs thereof.

Names of persons and names and locations of depository institutions authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), and (c)(9)(A)(ii)).

Note.—Some matters falling within this category may be placed on the discussion agenda without further public notice if it becomes likely that substantive discussion of those matters will occur at the meeting.

Discussion Agenda:

Matters relating to the possible closing of certain insured depository institutions.

Names and locations of depository institutions authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

Personnel actions regarding appointments, promotions, administrative pay increases, reassignments, retirements, separations, removals, etc.:

Names of employees authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(2) and (c)(6) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2) and (c)(6)).

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898–6757.

Dated: October 20, 1992.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 92–25795 Filed 10–20–92; 2:41 pm]

BILLING CODE 6714-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:02 a.m. on Tuesday, October 20, 1992, the Board of Directors of the Federal Deposit Insurance Corporation

met in closed session to consider the following:

Matters relating to the probable failure of certain insured bank.

Recommendation concerning an administrative enforcement proceeding.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Director Stephen R. Steinbrink (Acting Comptroller of the Currency), concurred in by Director T. Timothy Ryan, Jr., (Office of Thrift Supervision) and Acting Chairman Andrew C. Hove, Jr., that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 550–17th Street NW., Washington, DC

Dated: October 20, 1992.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 92–25835 Filed 10–20–92; 3:31 pm]

BILLING CODE 6714–01–M

FEDERAL ELECTION COMMISSION:

* * * * *

"FEDERAL REGISTER" NUMBER: 92–25194.

PREVIOUSLY ANNOUNCED DATE AND TIME: Thursday, October 22, 1992, 10:00 a.m., meeting open to the public.

THE FOLLOWING ITEM WAS ADDED TO THE AGENDA: Advisory Opinion 1992–37: Mr. Randall A. Terry.

* * * * *

DATE AND TIME: Tuesday, October 27, 1992 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.

Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

DATE AND TIME: Wednesday, October 28, 1992 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This oral presentation will be open to the public.

MATTER BEFORE THE COMMISSION: Jackson for President '88 Committee, Federal Election Commission, Sunshine Act Notices for Meetings of October 22, 27, 28, and 29, 1992.

DATE AND TIME: Thursday, October 29, 1992 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes
Title 26 Certification Matters
Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone: (202) 219–4155.

Delores Hardy,

Administrative Assistant.

[FR Doc. 92–25812 Filed 10–20–92; 2:55 pm]

BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 57 FR 47511, October 16, 1992.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10:00 a.m., Wednesday, October 21, 1992.

CHANGES IN THE MEETING: Deletion of the following open item from the agenda:

Request by the Financial Accounting Standards Board for comments on its proposal on accounting for impaired loans.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: October 16, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–25818 Filed 10–20–92; 3:04 am]

BILLING CODE 6210–01–M

MERIT SYSTEMS PROTECTION BOARD

TIME AND DATE: 10:00 a.m., Friday, October 30, 1992.

PLACE: Eighth Floor, 1120 Vermont Avenue, NW., Washington, DC 20419.

STATUS: The meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Internal personnel rules and practices, matters the premature disclosure of which would likely frustrate implementation of a proposed agency activity, and the following cases pending before the Baord:

1. *Hawkins v. U.S. Postal Service,* AT0752870068X1
2. *Hooks v. U.S. Postal Service,* PH0752870444X1
3. *Wilkins v. U.S. Postal Service,* SF0752860201X1
4. *Lunkin v. U.S. Postal Service,* SF0752850038X1
5. *Alston v. Department of the Navy,* AT07529010238–R–1
6. *Special Counsel v. Byrd and Rubenstein,* CB–1215–91–0016–T–1, CB1215–91–0017–T–1
7. *Special Counsel v. Narcisse,* CB–1216–91–0025–R–1

CONTACT PERSON FOR ADDITIONAL INFORMATION: Robert E. Taylor, Clerk of the Board, (202) 653–7200.

Dated: October 20, 1992.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 92–25833 Filed 10–20–92; 3:30 pm]

BILLING CODE 7400–01–M

federal register

Thursday
October 22, 1992

Part II

Securities and Exchange Commission

17 CFR 240 and 249

Communications Among Shareholders Regulation; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release Nos. 34-31326; IC-19031; File No. S7-15-92]

RIN: 3235-AE12

Regulation of Communications Among Shareholders

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Securities and Exchange Commission ("Commission") today announces the adoption of amendments to its proxy rules promulgated under section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act"). By removing unnecessary government interference in discussions among shareholders of corporate performance and other matters of direct interest to all shareholders, these rules should reduce the cost of regulation to both the government and to shareholders. The amendments eliminate unnecessary regulatory obstacles to the exchange of views and opinions by shareholders and others concerning management performance and initiatives presented for a vote of shareholders. The amendments also lower the regulatory costs of conducting a regulated solicitation by management, shareholders and others by minimizing regulatory costs related to the dissemination of soliciting materials. The rules also remove unnecessary limitations on shareholders' use of their voting rights, and improve disclosure to shareholders in the context of a solicitation as well as in the reporting of voting results.

EFFECTIVE DATE: These rules are effective October 22, 1992.

Transition Provision: The new rules are effective October 22, 1992, and any registrant or person engaging in a proxy solicitation may rely on the new rules at any time thereafter. However, to facilitate a smooth transition to use of the new rules, the following transition provisions will be allowed by the Commission. Soliciting parties and registrants are required to comply with the new rules for: (1) Any new proxy or information statement, form of proxy, and any periodic report under the Exchange Act filed on or after November 23, 1992; and (2) any request for a mailing or shareholder list received from a shareholder on or after that date.

FOR FURTHER INFORMATION CONTACT: David A. Sirignano, Chief, Office of Tender Offers at (202) 272-3097, Catherine T. Dixon, Chief, Elizabeth M. Murphy, Special Counsel, or James R. Budge, Special Counsel, Office of Disclosure Policy at (202) 272-2589, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is today adopting several amendments to its proxy rules and related disclosure requirements. These changes include:

(1) Rule 14a-2(b) [1] has been amended to create an exemption from the proxy statement delivery and disclosure requirements for communications with shareholders, where the person soliciting is not seeking proxy authority and does not have a substantial interest in the matter subject to a vote or is otherwise ineligible for the exemption. Public notice of written soliciting activity will be required by beneficial owners of more than $5 million of the registrant's securities through publication, broadcast or submission to the Commission of the written soliciting materials;

(2) The definition of "solicitation" in Rule 14a-1 [2] has been amended to specify that a shareholder can publicly announce how it intends to vote and provide the reasons for that decision without having to comply with the proxy rules;

(3) Rule 14a-3 [3] has been amended to add a new paragraph (f), exempting solicitations conveyed by public broadcast or speech or publication from the proxy statement delivery requirements, provided a definitive proxy statement is on file with the Commission;

(4) Rules 14a-3(a) and 14a-4 [4] have been amended to allow registrants and other soliciting parties to commence a solicitation on the basis of a preliminary proxy statement publicly filed with the Commission, so long as no form of proxy is provided to the solicited shareholders until the dissemination of a definitive proxy statement;

(5) Rule 14a-6 [5] has been amended to allow solicitation materials other than the proxy statement and form of proxy to be filed with the Commission in definitive form at the time of dissemination. In addition, preliminary proxy statements are now available for public inspection when filed except in connection with business combinations other than roll-ups and going private transactions;

(6) Rule 14a-7 [6] has been amended to require registrants, in the case of transactions subject to the Commission roll-up or going private rules, to provide shareholders, upon written request and satisfaction of certain conditions, copies of its list of shareholder names, addresses, and position listings, as well as any list of non-objecting or consenting beneficial owners where in possession of the registrant. In all other cases, registrants are required to make an election either to provide a list to, or mail materials for, the requesting shareholders;

(7) Rules 14a-4(a) and (b)(1) [7] have been amended to require that the form of proxy set forth each matter to be voted upon separately in order to allow shareholders to vote individually on each matter;

(8) Rule 14a-4(d) [8] has been amended to allow shareholders who seek minority representation on the board of directors to seek proxy authority to vote for one or more of management's nominees, so long as the names of non-consenting nominees do not appear on the dissident's form of proxy or in the dissident's proxy statement;

(9) Rule 14a-11(c) [9] which mandated the filing of Schedule 14B [10] by all participants other than the registrant in an election contest, has been rescinded; and

(10) Items 4(c) of Forms 10-K, [11] 10-Q, [12] 10-KSB [13] and 10-QSB [14] and Item 21 of Schedule 14A [15] have been revised to require improved disclosure of voting results and of the vote needed for approval of matters presented to shareholders.

Table of Contents

[1] 17 CFR 240.14a-2(b)
[2] 17 CFR 240.14a-1(*l*).
[3] 17 CFR 240.14a-3.
[4] 17 CFR 240.14a-4.
[5] 17 CFR 240.14a-6.
[6] 17 CFR 240.14a-7.
[7] 17 CFR 240.14a-4(a) and (b)(1).
[8] 17 CFR 240.14a-4(d).
[9] 17 CFR 240.14a-11(c).
[10] 17 CFR 240.14a-102.
[11] 17 CFR 249.310.
[12] 17 CFR 249.308a.
[13] 17 CFR 240.310b.
[14] 17 CFR 240.308b.
[15] 17 CFR 240.14a-101.

I. Introduction

The amendments to the proxy rules and other disclosure provisions adopted today follow upon an extensive three-year examination by the Commission of the effectiveness of the proxy voting process and its effect on the corporate governance system in this country. This examination included consultations and discussion with, and receipt of commentary from, shareholders, issuers, directors, academics, and other interested groups. The amendments are the product of two releases proposing and reproposing a number of amendments to the proxy rules. Together these releases engendered over 1700 comment letters from the public.

Within the overall scope of this broad examination, the Commission has focused particularly on the role of its proxy and disclosure rules in impeding shareholder communication and participation in the corporate governance process. This demonstrated effect of the current rules is contrary to Congress's intent that the rules assure fair, and effective shareholder suffrage. Apart from attempts to obtain proxy voting authority, to the degree the current rules inhibit the ability of shareholders not seeking proxy authority to analyze and discuss issues pertaining to the operation of a company and its performance, these rules may in fact run exactly contrary to the best interests of shareholders.

The amendments adopted today reflect a Commission determination that the federal proxy rules have created unnecessary regulatory impediments to communication among shareholders and others and to the effective use of shareholder voting rights. The Commission has also determined that modifications in the current rules are desirable to reduce these burdens and to achieve the purposes set forth in the Exchange Act.

Underlying the adoption of section 14(a) of the Exchange Act [16] was a Congressional concern that the solicitation of proxy voting authority be conducted on a fair, honest and informed basis. Therefore, Congress granted the Commission the broad "power to control the conditions under which proxies may be solicited," and to promote "fair corporate suffrage." [17] A necessary element of the Commission's mandate was "to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitations." *J.I. Case* v. *Borak*, 377 U.S. 426, 431 (1964). This concern with disclosure included preventing the solicitation of proxies "without fairly informing the stockholders of the purposes for which the proxies are to be used." [18]

Prior to a shareholder granting the legal power to someone else—whether management or an outsider—to vote his or her stock, the shareholder needs to know what matters will be voted on, and how the recipient of the proxy intends to vote the shareholder's shares. This fundamental objective is intended to deal with the problems that would arise if a shareholder was advised that his or her shares were going to be voted on the election of directors and auditors, and instead the proxy was used to vote, for example, in favor of a merger with another company owned by insiders on unfavorable terms.

Thus, the description of the matters to be brought before a meeting for a vote (including the election of directors), the material information related to all such matters (including any substantial interest the soliciting person has in the subject matter of the vote), and the specifics on how the proxy recipient proposes to vote on behalf of the proxy giver unless otherwise instructed are core information critical to shareholders as part of the proxy process. Likewise, the terms of the proxy authority solicited and the ability of soliciting shareholders to reach other shareholders are key elements in assuring the fairness of the solicitation of proxy authority. On the whole, the regulatory scheme adopted by the Commission pursuant to the broad authority granted by section 14(a) has been designed to make sure that management and others who solicit shareholder proxies provide this needed information to shareholders, allow them to instruct the specific use of their proxy and provide them access to other shareholders through mailing or by access to a shareholder list.

Originally, the definition of "solicitation" of a proxy reflected this principal focus of the proxy rules, by limiting the reach of those rules to any "request" for a proxy or the furnishing of a proxy, consent, or authorization to security holders. [19] Thereafter, the definition was broadened to make clear that any communication by a person soliciting proxy authority, not just the communication delivered with the form of proxy, was a solicitation. [20] However, in 1942, without explanation, the Commission expanded the definition of "solicitation" of a proxy to include "any request to revoke or not execute a proxy * * *." [21]

In 1956, the Commission significantly expanded the definition of "solicitation" of a proxy to embrace "any communication" which could be viewed as being "reasonably calculated" to influence a shareholder to give, deny or revoke a proxy. In adopting the sweeping 1956 definition, the Commission sought to address abuses by persons who were actually engaging in solicitations of proxy authority in connection with election contests. [22] The

[16] 15 U.S.C. 78n(a).

[17] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934) at 14. The House Report indicated that the Commission was provided with this broad power "with a view to preventing the recurrence of abuses which * * * [had] frustrated the free exercise of the voting rights of stockholders." Id.

[18] Id.

[19] Exchange Act Rel. No. 378 (Sept. 24, 1935).

[20] See Exchange Act Rel. No. 1823 (Aug. 11, 1938); Exchange Act Rel. No.2376 (Jan. 12, 1940).

[21] Exchange Act Rel. No. 3347 (Dec. 18, 1942).

[22] Exchange Act Rel. No. 5276 (Jan. 17, 1956). It is clear that at the time the definition was amended, the Commission was principally concerned with communications "by any person who has solicited or intends to solicit proxies" prior to the formal commencement of the solicitation. *Id.* See also Stock Market Study (Corporate Proxy Contests), Part 3: Hearings on S. 879 before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. at 1692 (Statement of Chairman Armstrong) (purpose of amendments was to ensure that shareholders are "fully and fairly informed about the interests which seek to elect directors and about the nominees who offer themselves or are offered by others to assure responsibility for management").

Commission does not seem to have been aware, or to have intended, that the new definition might also sweep within all the regulatory requirements persons who did not "request" a shareholder to grant or to revoke or deny a proxy, but whose expressed opinions might be found to have been reasonably calculated to affect the views of other shareholders positively or negatively toward a particular company and its management or directors. Since any such persuasion—even if unintended—could affect the decision of shareholders even many months later to give or withhold a proxy, such communications at least literally could fall within the new definition.

The literal breadth of the new definition of solicitation was so great as potentially to turn almost every expression of opinion concerning a publicly-traded corporation into a regulated proxy solicitation. Thus, newspaper op-ed articles,[23] public speeches or television commentary on a specific company could all later be alleged to have been proxy solicitations in connection with the election of directors, as could private conversations among more than 10 shareholders.[24] This created a basis upon which claims that the proxy rules, including the mandatory disclosure, filing and dissemination provisions of those rules, could be brought to bear not only on persons seeking authority to vote another's shares, but also on those persons merely expressing a view or opinion on management performance or on initiatives presented by management and others for a shareholder vote.

If the current proxy rules apply to a communication, the effect can be very costly. Among other things, the person making the communication would be required to prepare a proxy statement and mail it to every shareholder of the company who is deemed to have been solicited. Where a communication appears in the public media, the Commission has taken the position that all shareholders have been solicited. In such a case, the cost of the mailing requirement alone could run into hundreds of thousands of dollars, and the decision on whether a solicitation occurred will be judged purely in hindsight. Thus, shareholders can be deterred from discussing management and corporate performance by the prospect of being found after the fact to have engaged in a proxy solicitation. The costs of complying with those rules also has meant that, unless they have substantial financial backing, shareholders and other interested persons may effectively be cut out of the debate regarding proposals presented by management or shareholders for a vote.

To correct this distortion of the purposes of the proxy rules, initially highlighted in petitions and other requests from the shareholder community for reform, the Commission proposed several revisions to the proxy rules intended to deregulate constraints on communications by persons who do not seek to obtain proxy authority from any other shareholders, and who do not have a substantial interest in the subject matter of the communication beyond the interest of such person as a shareholder. The original rule proposal was intended to allow such "disinterested" persons who are not seeking proxy authority to express their views freely, without any requirement to file materials with, or otherwise to notify, the Commission. Under this proposal, all communications would have remained subject to antifraud standards, but the excessive regulatory reach of "solicitation" would have been narrowed significantly. The Commission also proposed to remove some of the unnecessary regulatory costs from the regulated proxy solicitation process, such as by eliminating the requirement to obtain preclearance of all soliciting materials from the Commission's staff before their dissemination.

These proposals elicited widespread approval by the shareholder community and further suggestions for reform. Many commenters expressed the view that the proxy rules created both costs and a chilling effect on attempts to participate in the governance process by expressing their views.

The corporate community raised numerous objections to the proposals. Many corporate commenters argued that absent a filing obligation in connection with all communications among shareholders, the reforms would "further the disturbing trend toward the determination of the outcome of shareholder voting by secret back-room lobbying of and negotiations with institutional investors, rather than in open and public proxy campaigns."[25] However, these comments did not provide examples of cases in which the outcome of a proposal submitted for a shareholder vote had been determined through secret actions of institutional investors. These comments also did not explain why any shareholder seeking to assemble majority voting support for a proposal would wish to keep the arguments in favor of the shareholder's position secret. Maximizing the knowledge of a shareholder's views rather than concealing them would seem the more likely approach.

When and under what circumstances a large shareholder, or group of shareholders acting together, must reveal to the SEC, the company, other shareholders, and the market its plans and proposals regarding the company has been addressed by Congress, but not through the provisions governing proxy solicitations. Section 13(d) of the Exchange Act, as implemented by the Commission in its regulations adopted thereunder,[26] sets forth the circumstances when public disclosure of plans and proposals by significant shareholders, as well as agreements among shareholders to act together with respect to voting matters, must be disclosed to the market.

Corporate commenters also argued that disclosure of communications among shareholders is necessary to allow management "a role to play" in rebutting any misstatements or mischaracterizations, to the benefit of shareholders as a whole in ensuring that proxies are executed on the basis of "correct" information. Of course, much commentary concerning corporate performance, management capability or directorial qualifications or the desirability of a particular initiative subject to a shareholder vote is by its nature judgmental. As to such opinions, there typically is not a "correct" viewpoint.

While voting rights are valuable assets and an uninformed exercise of those rights could represent a wasted opportunity for the voting shareholder, that concern does not justify the government's requiring that all private conversations on matters subject to a shareholder vote be reported to the government. In the Commission's view, the antifraud provisions provide adequate protection against fraudulent and deceptive communications to

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[23] See Letter re College Retirement Equities Fund, dated November 12, 1986 (no action relief with respect to op-ed piece submitted by employees of shareholder proponent of proposals on same issue, so long as article was solicited by newspaper, constituted a general discussion and did not refer to specific proposal, and appeared three months prior to meeting). Cf. Letter from the Director of the Division of Corporation Finance to the American Newspaper Association, dated September 27, 1955 (addressing concern that proxy rules could apply to newspaper's own editorials relating to a proxy contest, by stating that rules, as well as proposed amendments then under consideration, only apply to persons who solicit proxies from holders).

[24] Since 1942, conversations with not more than 10 shareholders have been exempt "solicitations." Exchange Act Rel. No. 3347 (Dec. 18, 1942) (exempting "less than 10").

[25] Comment letter submitted by The Business Roundtable, dated September 18, 1991, at 2.

[26] 15 U.S.C. 78m(d) and Regulation 13D/G, 17 CFR 240.13d-1, *et seq.*

shareholders on matters presented for a vote by persons not seeking proxy authority and not in the classes of persons ineligible for the exemption.

A regulatory scheme that inserted the Commission staff and corporate management into every exchange and conversation among shareholders, their advisors and other parties on matters subject to a vote certainly would raise serious questions under the free speech clause of the First Amendment, particularly where no proxy authority is being solicited by such persons. This is especially true where such intrusion is not necessary to achieve the goals of the federal securities laws.

The purposes of the proxy rules themselves are better served by promoting free discussion, debate and learning among shareholders and interested persons, than by placing restraints on that process to ensure that management has the ability to address every point raised in the exchange of views. Indeed, the Commission has not perceived, and the comments have not demonstrated, shareholder abuses where proxy authority is not being sought by the person engaged in the communications. However, there have been situations in which discontented shareholders have been subjected to legal threats based on the possibility the shareholder might have triggered proxy filing requirements by expressing disagreement to other shareholders.

In the amendments adopted today, the Commission has also attempted to remove unnecessary impediments to the solicitation of proxy authority to allow management and other persons seeking proxy authority more efficiently and effectively to get their case to the shareholders. The rules as adopted today reflect views expressed both by shareholders that some of the proposed restrictions would have had significant deterrent effect to the expression of views, and by management commenters that certain unnecessary restraints on their communications with shareholders remained under the reproposals.

II. Discussion of Amendments and New Rules

A. Exemption for Persons Not Seeking Proxy Authority

1. Exempt Solicitations

The initiative to exempt from the proxy rules (other than Rule 14a–9) solicitations by persons who are not seeking proxy authority and do not have a substantial interest in the matter was undertaken as a result of the substantial concern raised by public commentary and letters to the Commission and its staff. These concerns were subsequently confirmed in many of the comment letters that were filed in response to the proposal [27] and reproposal.[28] These letters took the position that the current rules unnecessarily curtail communications by shareholders on matters related to the company and its management, as well as with respect to matters presented by the registrant or a third party for shareholder action.

Of course, compliance with the proxy rules is necessary only if the communication constitutes a proxy solicitation within the meaning of those rules. However, an essential problem in this area is that it is generally *not* possible for a shareholder to know with certainty that a communication will or will not be deemed to constitute a solicitation. The broad definition of a proxy solicitation that includes not only a request for a proxy or request to execute, not execute or revoke a proxy, but also "the furnishing of * * * a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy," creates this inherent uncertainty for shareholders.[29] As a result of this definition, almost any statement of views could be alleged to be a solicitation, and the shareholder could be exposed to litigation by the company challenging the failure to incur massive proxy mailing and other costs. Only after such a claim was litigated would the shareholder know whether a speech or printed article, for example, criticizing the quality of a company's management would be deemed to have been a solicitation.

As made clear from the comment letters from shareholders on the initial proposal and reproposals, the scope of the definition of solicitation under the proxy rules does have a chilling effect on discussion of management performance, out of fear that the communication could after the fact be found to have triggered disclosure and filing obligations under the federal proxy rules. The cost of compliance with the proxy rules likewise could deter shareholders wishing to express support for, or opposition to, management or third party proposals or director nominees. The regulatory scheme imposed virtually the same requirements and therefore costs on discussions about management proposals and nominees as it did on management in seeking authority to vote the shareholders' securities in favor of its proposals or nominees, where such discussions were found to fall within the definition of solicitation.

In most instances management, with access to corporate funds to finance the solicitation, would be the only party willing to assume the regulatory costs, resulting in a one-sided discussion of the merits of the matters put to a vote. The proxy rules thus unduly hindered free discussion that could better inform shareholders as to their voting decisions.

To address these concerns, the Commission proposed in June 1991, and reproposed with modifications in June 1992, a new exemption from the regulatory requirements of the proxy rules [30] for a solicitation by or on behalf of persons (i) who do not seek the power to act as a proxy, or furnish or request, or act on behalf of a person who furnishes or requests, a consent or authorization for delivery to the registrant, and (ii) who are disinterested in the subject matter of a vote.

As initially proposed, such a disinterested person would have been absolutely free to communicate with other shareholders in writing or orally without any filing requirement whatsoever. The rule as reproposed specified nine classes of persons specifically excluded from relying on the exemption for persons not seeking proxy authority. In a major change from the initial proposal, the reproposal required persons relying on the exemption in connection with the dissemination of written soliciting material to submit that material or mail it to the Commission, under the cover of a new notice form, within 10 days of its use. No such notice

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[27] Exchange Act Rel. No. 29315 (Jun. 17, 1991)[56 FR 28987]. The Commission received more than 900 letters of comment in response to its June 1991 release. The comment letters and a staff summary of the letters may be inspected and copied at the Commission Public Reference Room (File No. S7–22–91).

Prior to publication of the June 1991 release, the Commission and staff received more than 50 letters proposing changes to the Commission's proxy and disclosure rules, or commenting on such proposals. More than 500 letters were submitted by individual members of the United Shareholders Association, in support of a rulemaking petition submitted by that organization. These letters are included in Public File No. 4–353.

[28] Exchange Act Rel. No. 30849 (Jun. 23, 1992)[57 FR 29564]. More than 800 additional letters were received in response to the June 1992 release.

[29] 17 CFR 240.14a–1(*l*)(1)(iii). Notwithstanding the breadth of the definition, it is clear, as noted by The Business Roundtable in its letter, that "shareholders doing nothing more than exchanging opinions about the management's performance would not be a solicitation." Letter dated August 28, 1992.

[30] Pursuant to the exemption, solicitations by or on behalf of eligible persons would be exempt from all of the proxy statement filing, delivery and information requirements imposed by the proxy rules but remain subject to Rule 14a–9, 17 CFR 240.14a–9, which prohibits false or misleading statements in connection with written or oral solicitations.

requirement was proposed for published or broadcast solicitations or oral solicitations.

Nearly all of the commenters responding to the reproposals addressed the exemption. While there still was considerable comment regarding the merits of the exemption, the controversy focused primarily on the notice submission requirement, and the distinction made by the Commission between oral communications and written soliciting material.

Concerning the merits of the proposal, many of the commenters responding to the reproposals, including a substantial number of individual investors, supported the exemption on the ground that it would enable them to exercise more easily their constitutionally protected rights to discuss corporate proposals voted on at shareholder meetings, as well as the effectiveness of management in achieving long term performance goals and increasing shareholder values. Many institutional investors also viewed the exemption as an important measure to help them fulfill their fiduciary obligations. Despite the general support for the proposed exemption, many shareholders strongly opposed, as overly intrusive, the requirement in the reproposal that written solicitations be submitted to the SEC. A significant number of shareholder commenters expressed concerns over the potential liability that solicitors relying on the exemption might incur, particularly in connection with the notice submissions.

Corporate and legal practitioners strongly reiterated their concerns that the provisions of the exemption would permit institutional investors and other large shareholders to conduct "secret" solicitation campaigns in support of their proposals and against management proposals. They supported the requirement to submit written proposals but remained very concerned that shareholders should be required to notify the SEC concerning all oral communications, and to disclose the substantive content of their communications. They warned that the absence of a notice requirement with respect to oral solicitations suggests an improper preference for such solicitations and creates a loophole that potentially may undermine the notice requirement by causing solicitation activities to be conducted orally.

The commenters opposed to exclusion of oral communications from the notice requirement also argued that maintenance of a fair and balanced solicitation process requires that all interested parties, including the marketplace, be apprised of the existence and substance of a significant solicitation. They also argued that interested parties need an opportunity to respond to inaccurate and misleading comments.

These commenters did recognize that there were classes of solicitation efforts that did not raise sufficient concerns to warrant notice requirements. Some suggested exclusion from notice requirements based on limited shareholdings by the solicitor, such as $5 million. Others suggested exclusion from the notice requirements where the holdings both of the solicitor and solicitees did not exceed a specified threshold, such as 5% of any class of outstanding securities.

As to the distinction between oral and written communications, the Commission has expressly determined that the burdens of requiring a notice to the federal government of oral communications, except in the case where the speaker is seeking to obtain proxy authority for himself, or is in the class of persons the Commission has excluded from eligibility for the exemption due to a substantial association with soliciting parties or special interest in the subject matter of the vote, are not justified by any benefit to be derived therefrom, and that such a requirement is not necessary or desirable in achieving the purposes of section 14(a).

The Commission has weighed the benefits of the proposals against the potential for abuse both by insurgents and by management. The Commission has concluded the best protection for shareholders and the marketplace is to identify those classes of solicitations that warrant application of the proxy statement disclosure requirement, and to foster the free and unrestrained expression of views by all other parties by the removal of any regulatory cost, burden or uncertainty that could have the effect of deterring the free expression of views by disinterested shareholders who do not seek authority for themselves. Contested solicitations by those seeking power or authority for themselves would remain subject to the requirements to file with the Commission and deliver a proxy statement to shareholders. Shareholders will be better protected by having access to as many sources of opinions relating to voting matters as possible and thus will benefit from the removal of unnecessary costs imposed on the expression of those views.

The Commission disagrees with some commenters who argue that oral and written communications are largely indistinguishable in terms of the purposes of the proxy rules. Written analyses can be far longer and more complex than most oral conversations. They can include extensive quantities of data—often displayed using charts and graphs. Written documents can be circulated by the recipient to any number of persons in the same organization or outside, while an oral conversation cannot generally be "republished" to persons other than the original participants. Written documents can be saved and referred to over and over again. Oral conversations, by contrast, are more ephemeral. Moreover, the burden of mailing one extra copy of something already being sent to more than 10 other shareholders is minimal compared with a requirement that oral conversations must be memorialized and reported to the government.

In light of the considerations raised by the commenters, as adopted the exemption contains three modifications from the reproposal. First, persons who beneficially own $5 million or less of the company's securities that are the subject of the solicitation will not be required to submit written soliciting material to the SEC. As recognized by commenters, smaller shareholders do not present the concerns raised by commenters with respect to the exemption, and they are less likely to even be aware of this requirement, much less have the means or sophistication to meet that requirement. Rather, it is principally with respect to significant shareholders that corporate commenters raised concerns.

Second, the notice is required to be delivered or mailed to the SEC within three days of first use of the soliciting material, not ten days as proposed.

Finally, consistent with the Commission's fundamental conclusion that the interests of shareholders are best served by more, and not less, discussion of matters presented for a vote, officers and directors of the company who are soliciting at their own expense will be entitled to rely upon the exemption.

2. Qualifications for Reliance on the Exemption

The Rule 14a–2(b)(1) exemption as adopted generally is available to any person, whether or not a shareholder, who conducts a solicitation but does not seek proxy voting authority or furnish shareholders with a form of consent, authorization, abstention, or revocation, and does not act on behalf of any such person.[31] The rule sets forth the

[31] A solicitation would not be deemed to be conducted on behalf of an ineligible person merely

Continued

following categories of persons who are ineligible to rely on the exemption:

(a) The registrant or an affiliate or associate of the registrant (other than an officer or director or any person serving in a similar capacity);

(b) Any officer or director of the registrant, or person serving in a similar capacity, engaging in a solicitation financed by the registrant;

(c) Any officer, director, affiliate or associate of an ineligible person other than the registrant, or any person serving in a similar capacity;

(d) Any nominee for whose election as a director proxies are solicited;

(e) Any person soliciting in opposition to a merger, recapitalization, reorganization, sale of assets or other extraordinary transaction recommended or approved by the board of directors of the registrant who is proposing or intends to propose an alternative transaction to which such person or one of its affiliates is a party;

(f) Any person required to report beneficial ownership of the registrant's equity securities on Schedule 13D, unless the person has filed a Schedule 13D and has not disclosed an intent, or reserved the right, to engage in a control transaction, or a contested solicitation for the election of directors;

(g) Any person who receives compensation (other than reimbursement pursuant to the shareholder communications rules) directly related to the solicitation of proxies from an ineligible person;

(h) Where the registrant is an investment company registered under the Investment Company Act of 1940,[32] an "interested person" of that investment company, as that term is defined in section 2(a)(19) of the Investment Company Act;[33]

(i) Any person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that will not be shared pro rata by all other holders of the same class of securities, other than by virtue of the person's employment with the registrant; and

(j) Any person acting on behalf of any of the foregoing.

As described above, pursuant to the exemption as adopted, officers and directors of the registrant, as well as persons serving in similar capacities, may rely on the exemption provided that their solicitations are not financed by the registrant, and they otherwise are not engaging in the registrant's solicitation. This change from the reproposal was prompted by remarks by some commenters that they should be able to rely on the exemption if conducting personal solicitations at their own expense. These commenters expressed concern that the exemption as reproposed excluded officers and directors, but not other employees of the registrant. Since the effect will be to provide shareholders with additional sources of information, opinions and views regarding corporate matters, the Commission has adopted the suggestion.

Another category of persons not eligible to rely on the exemption are persons who have a substantial interest in the matter to be acted upon.[34] This limitation does not apply to an interest arising from the ownership of securities of the registrant where the shareholder does not receive extra or special benefits that are not shared *pro rata* by all other holders of the same class. Interests arising from the soliciting party's employment with the registrant are likewise specifically carved out of the exclusion.

A person conducting a solicitation in connection with a Rule 14a–8 shareholder proposal will not be deemed to have a substantial interest in the solicitation solely on the basis of its sponsorship of the proposal. Therefore, any such person may rely on the exemption provided that the person does not seek proxy voting authority and is not otherwise ineligible.[35]

As previously indicated by the Commission, any person who relies on Rule 14a–2(b)(1) for exempt communications will be deemed to have made an irrevocable election to maintain exempt status throughout the relevant soliciting period.[36] Thus, a person who relies on the exemption could not undertake, with respect to the same meeting or solicitation, a regulated proxy solicitation regarding a matter that was the subject of the exempt solicitation without rendering the prior solicitation activity in violation of the full panoply of the proxy rules. The rule has been clarified in this respect.

3. Notice of Exempt Solicitations

As noted, in response to the comments, the Commission is adopting a notice requirement for all written solicitations conducted by persons owning beneficially more than $5 million of the securities that are the subject of the solicitation, other than speeches in a public forum, press releases, and published or broadcast opinions, statements or advertisements.[37] At the same time, there will not be any notice or filing requirement for oral communications.[38]

The Commission has not expanded the information called for by the notice or required a signature or attestation, as suggested by some corporate commenters. The notice is not intended to serve as a disclosure document or to be the basis for litigation as to its adequacy. Rather, it is designed as the simplest means to get written soliciting material into the public domain. For that reason, the proposed requirement for disclosure of share holdings in the notice has not been adopted.

The timing provisions for submitting the notice have been revised in response to comments. Persons required to submit written soliciting materials must furnish or send copies of the materials to the Commission, and any national exchange that the securities are listed on, within three days of the date that the material is first given or sent to shareholders. These materials must be submitted under cover of the new Notice of Exempt Solicitation.[39] The notice will become publicly available immediately upon receipt by the Commission.

The period for mailing or submission of the notice was shortened from ten days, as reproposed, to three days, in response to commenters' remarks. Given the limitation of the notice requirement to large shareholders, the Commission's concerns about less sophisticated shareholders that gave rise to the ten-day period have been mitigated. Failure to mail the notice with the written materials within the specified period

because a person encourages shareholders to execute a form of proxy disseminated by such ineligible person.

[32] 15 U.S.C. 80a–1, *et seq.*

[33] 15 U.S.C. 80a–2.

[34] This standard is similar to that used in Item 5 of Schedule 14A, which requires specified persons conducting solicitations to describe briefly any substantial interest in the matter to be acted upon, other than an interest as a shareholder.

[35] The substantial interest test will be applied to the proponent on the basis of the subject matter of the proposal, not simply on the basis of inclusion in the proxy statement.

Other technical drafting changes suggested by commenters have been incorporated into the Rule.

[36] In the June 1991 Release, the Commission stated:

[A]ny person who purports to engage in an exempt solicitation with respect to a particular meeting or subject matter of securityholder action pursuant to proposed Rule 14a–2(b)(1) could not continue to rely on the proposed exemption through the assertion of a change in purpose or intent should he subsequently solicit authority to act on behalf of securityholders concerning the same meeting or subject matter. Because the earlier solicitation would not qualify for exempt treatment under such circumstances, any failure to comply with the full panoply of the proxy rules as to that solicitation would be deemed a proxy violation.

[37] The notice submission requirement is set forth in Rule 14a–6(g), 17 CFR 240.14a–6(g). The definition of publication is intended to be broad and is not limited to the type of publications found exempt from the Investment Advisers Act of 1940 [15 U.S.C. 80b–1, *et seq.*] in *Lowe* v. *SEC*, 472 U.S. 181 (1985).

[38] The First Amendment applies equally to written and oral communications. However, regulatory requirements can impose different degrees of burdens on different types of speech. Imposing a notice requirement on oral communications would result in greater burdens on communications about proxy voting issues than the Commission believes are warranted or necessary to achieve statutory requirements.

[39] The notice will not carry the proposed "Form 14" designation.

will not result in the loss of the exemption for the communication itself.

Corporate commenters argued that the submitter should be required to send a copy of the notice to the registrant as well. The Commission, however, is not adopting such a requirement. Persons engaged in non-exempt proxy solicitations do not have to send copies of their filings to the registrant, and it would not be appropriate to impose a greater burden in this regard on persons engaging in exempt solicitations.

The notice includes the name and address of the person relying on the exemption and the registrant's name. The written soliciting material disseminated is to be attached to the notice. Additional written soliciting materials that are materially different also are to be mailed or furnished to the Commission no later than three days following the date that such materials are first sent or given to shareholders.

Oral communications, speeches in a public forum, press releases, published or broadcast opinions, statements, and advertisements appearing in a broadcast media, newspaper, magazine, or other bona fide publication disseminated on a regular basis, expressly do not trigger the new notice requirement.[40] Some commenters suggested that excluding all published materials from the notice requirement would be inappropriate. For example, either the notice provided by one-time broadcasts or that provided by publications of limited or local circulation might be inadequate. The exclusion has not been restricted, however, because solicitations that are publicly published or broadcast, even if not broadly or repeatedly disseminated, including speeches in a public forum, do not lend themselves to the types of potential abuses raised by commenters to justify a notice requirement. The Commission does not intend to restrict the use of publications with smaller circulations or to interfere with the ability of shareholders and others to participate in broadcast talk shows or other programs that by their nature are not repeatedly broadcast.

Solicitations exempt from the notice requirement by virtue of having been published or broadcast may subsequently be freely disseminated without compliance with the notice requirement. Questions were presented whether press releases provided to, but not published by, the news media create any obligations under the proxy rules. A press release that has not been picked up by a news or wire service has not been published. Therefore, the press release may not be disseminated without complying with the notice requirement. Of course, a press release that is neither published by a news or wire service or otherwise disseminated, is not subject to the proxy rules.

In response to comments, scripts used in connection with oral solicitations will be viewed as written soliciting material required to be submitted under the notice requirement, by persons subject to that requirement. This approach was suggested as a means to provide notice of "telephone bank" and other widespread concerted oral solicitations that do not present the same privacy concerns or burdens as with other oral communications.[41]

B. Shareholder Announcements of Voting Decisions

As noted, the obligation to comply with the proxy rules turns on whether the communication falls within the Rule 14a–1 definition of "solicitation." The simple announcement by shareholders of how they intend to vote, whether or not coupled with the shareholders' reasons for their voting decisions, are not subject to the proxy rules. The reproposal included a safe harbor rule for those announcements that would not, in any case, be subject to the proxy rules. Statements regarding how the shareholder intends to vote and why that are not within the safe harbor still would not be a solicitation absent special facts and circumstances.

The commenters addressing this proposal generally recognized the appropriateness of allowing a shareholder to announce its voting decision and the reasons for that decision without having to comply with the proxy rules. A number of commenters, including many corporate representatives, expressed concern, however, with the potential for abuse of the provision. These commenters viewed the revision as a potential loophole that would allow a person conducting a concerted solicitation to avoid application of the proxy rules, including the antifraud provisions. It was suggested that the exemption be limited to a one-time announcement to the press, and that it should not include the distribution of written materials. On the other hand, shareholders believed the exemption was too narrow, arguing that it should encompass all disclosures of voting decisions, whether public or private. Other commenters called for clarification of the term "announcement."

The safe harbor as adopted excludes from the definition of solicitation announcements that are published, broadcast or disseminated to the media. There is no limitation on the number of announcements that can be published or broadcast.

The rule makes clear that all communications directed at beneficiaries or other persons with respect to whom the shareholder owes a fiduciary duty in connection with the voting of its portfolio securities are covered by the safe harbor. Finally, responding to unsolicited requests for information from other shareholders, including providing copies of the announcement on an unsolicited basis, likewise qualifies for the safe harbor. The safe harbor would be available to all shareholders, including officers and directors of the registrant, so long as they do not otherwise engage in a regulated solicitation.

Merely because an announcement or other communication or disclosure falls outside the safe harbor protection does not mean that it falls within the definition of solicitation and thus is subject to the proxy rules. The application of the general definition with respect to announcements of voting decisions not meeting the requirements of the new safe harbor remains unchanged under the revised regulatory scheme.

C. Proxy Solicitations Prior to Delivery of Proxy Statement

Rule 14a–3(a) provides that a solicitation may not be made unless each person solicited concurrently is furnished or previously has been furnished with a written proxy statement. Exemptions to this proxy statement delivery requirement are provided in Rule 14a–11(d) and 14a–12.[42] Rule 14a–11(d) permits the solicitation process in election contests to begin prior to the delivery of a proxy statement, so long as a proxy card is not provided, certain background

[40] Rule 14a–6(g).

[41] Questions have been raised about the status of advice provided to clients on voting issues under the proxy rules. See Letter re NASD, Inc. (May 19, 1992). Advice given with respect to matters subject to a shareholder vote by financial and investment advisers, investment banking and broker-dealer firms, and lawyers, as well as proxy advisory services in the ordinary course of business is covered by the exemption provided under Rule 14a–2(b)(2) (newly redesignated Rule 14a–2(b)(3)), so long as the other requirements of that exemption are met. Accordingly, the staff no-action letter in In re Institutional Shareholder Services, Inc. (Dec. 15, 1988), no longer may be relied upon as the view of the Commission or the staff.

[42] 17 CFR 240.14a–11(d) and 17 CFR 240.14a–12. Rules 14a–11(d) and (e) have been redesignated by the amendments as 14a–11(b) and (c). For the purposes of clarity, this release refers to the prior designation.

information concerning the participants is disclosed and a proxy statement is provided to shareholders as soon as practicable. There is no restriction on the content of such communications, other than that imposed by the antifraud provisions of Rule 14a–9.

The communications made pursuant to these provisions are required to provide background information on the soliciting party and other participants, including their interests in the subject matter of the solicitation.[43] Subject to similar requirements, Rule 14a–12 allows a solicitation in non–election contest matters to begin prior to delivery of a proxy statement to solicited persons where such solicitation is made in opposition to a prior solicitation or other publicized activity, which if successful, could reasonably have the effect of defeating the solicitation.

In the June 1992 release, the Commission proposed revisions to Rule 14a–12 that would have permitted a person to commence a solicitation prior to delivering a written proxy statement regardless of the existence of an opposing solicitation. The Commission also proposed to extend its provisions to election contests. Rules 14a–11(d) and (e) would have been rescinded as unnecessary.

The comments with respect to the proposal were mixed. Some commenters, including a registrant, believed the proposal would be beneficial. They believed registrants as well as soliciting shareholders would be benefited if allowed to discuss contemplated proposals with shareholders prior to the delivery of a proxy statement. A number of commenters expressed general support for the proposal and suggested technical revisions to the proposal. On the other hand, some commenters questioned whether there was a demonstrated need for the revisions and raised concern with the potential abuses that could arise from unlimited solicitations prior to delivery of a proxy statement.

The Commission has determined not to adopt the proposal. The broad scope of current Rules 14a–11(d) and 14a–12 reach virtually all contested and responsive solicitations. The need to extend Rule 14a–12 to all solicitations is mitigated by the proposal to allow registrants and other persons planning a solicitation to commence their solicitation on the basis of a publicly filed preliminary proxy statement, so long as no form of proxy is provided to shareholders until they receive a definitive proxy statement.[44] Since the flexibility to engage in that type of solicitation under the reproposals was an objective of the proposed amendments to Rule 14a–12 which now are not being adopted, the Commission has amended Rules 14a–3(a) and 14a–4 to implement specifically that reform.[45]

D. Amendment of Proxy Statement Delivery Requirement to Facilitate General Broadcast or Publication of Soliciting Materials

The Commission is adopting as proposed the amendment to Rule 14a–3 providing that the proxy statement delivery requirement set forth in paragraph (a) of the rule does not apply to a soliciting communication made solely by means of a speech in a public forum, or an opinion, statement or advertisement broadcast through radio or television media, or appearing in a newspaper, magazine or other publication disseminated on a regular basis.[46] The provisions of the amendment include the two proposed conditions: (1) No form of proxy, consent or authorization is provided to shareholders in conjunction with the communication; and (2) a definitive proxy statement is on file with the Commission pursuant to Rule 14a–6(b).

Prior to revision, Rule 14a–3(a) was interpreted as requiring a person broadcasting or publishing soliciting material to deliver a proxy statement to all shareholders, since the publication or broadcast was viewed as soliciting material furnished to all shareholders. However, this interpretation could result in immense costs, thereby penalizing use of public media. The amendment is intended to remedy the problem by removing the regulatory obstacle to published or broadcast solicitations.

Delivery of a form of proxy to a shareholder still must be accompanied or preceded by delivery of a definitive proxy statement. Thus, the modification does not affect proxy statement delivery requirements where a form of proxy is provided in conjunction with a speech, publication or broadcast or where a communication is made other than by a means specified in the rule.

E. Preliminary Filing and Staff Review of Soliciting Material

1. Soliciting Materials Other Than Proxy and Information Statements and Form of Proxy

Prior to the adoption of these amendments, Rule 14a–6 required that proxy statements and any additional proxy soliciting materials be filed in non-public, preliminary form with the Commission prior to delivery to shareholders, with exceptions for certain registrant "plain vanilla" proxy statements.[47] Similarly, Rules 14a–11(e) and 14a–12 required soliciting materials disseminated in advance of the written proxy statement to be filed in preliminary form five business days prior to dissemination.[48] Additional soliciting materials used after dissemination of a proxy statement, as well as personal soliciting material committed to writing, were subject to two and five business day preliminary filing requirements, respectively.[49] Rule

[43] Rule 14a–11(d) also required that a Schedule 14B be on file prior to the commencement of the solicitation. Under the amendment adopted today, the Schedule 14B filing requirement has been eliminated. Under Rule 14a–11(e) as amended, all written soliciting material disseminated in such solicitations would have to be filed or mailed for filing on the same day they are first published, sent or given to shareholders

[44] The June 1991 proposing release stated:

Although the proposals would not dispense with preliminary filing of the written proxy statement or form of proxy, the proposed amendments would eliminate the non-public treatment of preliminary proxy statements. Under the proposed approach, preliminary proxy materials would be treated in a manner similar to registration statements required by Section 5 of the Securities Act * * *. Accordingly, the preliminary filing requirements would permit the use of the preliminary form of the proxy statement, but would bar the transmittal or use of the form of proxy during the ten-day period or a shorter period in the case of an earlier clearance.

[45] Rules 14a–11(d) and 14a–12 also have been amended in response to a comment that those rules currently are ambiguous concerning which shareholders must subsequently receive the definitive proxy statement. Those rules now make clear that the soliciting party need only furnish as soon as practicable the definitive proxy statement to the shareholders actually solicited pursuant to Rules 14a–11(d) or 14a–12.

[46] The rule as adopted refers to a "communication" made solely by general broadcast or publication rather than a "solicitation" made solely by general broadcast or publication in response to a comment that it was unclear as proposed whether the term "solicitation" referred only to the specific broadcast or publication or to all solicitation activity undertaken by a person planning to rely on the rule

[47] Under Rule 14a–6(a), 17 CFR 240.14a–6(a), preliminary proxy statements were required to be on file at least 10 calendar days prior to the dissemination of definitive materials, unless the staff by delegated authority accelerated the period. Additional soliciting materials were required to be on file two business days prior to dissemination pursuant to Rule 14a–6(b), 17 CFR 240.14a–6(b). No preliminary filings were required with respect to speeches, press releases or scripts. Rule 14a–6(h), 17 CFR 240.14a–6(h).

[48] Rule 14a–11(e), 17 CFR 240.14a–11(e) (election contests) and Rule 14a–12(b), 17 CFR 240.14a–12(b) (other contested matters).

[49] Rule 14a–6(d) required that personal solicitation material, generally consisting of written material or instructions that form the basis of a program of personal, typically oral solicitation of shareholders, be filed with the Commission at least five calendar days before use.

14c–5(a) [50] imposed similar filing requirements for preliminary information statements.

Today's amendments will allow all soliciting materials, other than proxy and information statements or forms of proxy relating to certain matters, to be filed only in definitive form at the time of dissemination, whether prior or subsequent to the circulation of the written proxy statement. Materials not subject to a preliminary filing requirement must be filed with, or mailed for filing to, the Commission and sent to the exchanges on the same day that they are first published, sent or given to shareholders.

Comment on these proposals generally was mixed. Some corporate commenters opposed the proposals, arguing that preliminary filing and staff review is the most cost-effective means of assuring that soliciting materials do not contain false or misleading statements, and that the revisions may result in increased litigation regarding soliciting material. On the other hand, a number of commenters argued that staff review did not significantly improve the communication, and some commenters even argued that staff comment reduced the substance and quality of the communications.

The Commission believes that the most cost-effective means to address hyperbole and other claims and opinions viewed as objectionable is not government screening of the contentions or resort to the courts. Rather, the parties should be free to reply to the statements in a timely and cost-effective manner, challenging the basis for the claims and countering with their own views on the subject matter through the dissemination of additional soliciting material. The amendments adopted today applicable to regulated solicitations are intended to promote that goal.

2. Preliminary Filing of Proxy Statement and Form of Proxy Retained

The amendments retain the preliminary filing requirements of Rule 14a–6(a) relating to written proxy statements and forms of proxy. While a number of commenters supported elimination of staff review of certain proxy statements, these commenters differed on which categories of proxy statements should be exempt from preliminary filings. In light of these differences, as well as the number of commenters supporting continued review, preliminary filing of these documents that are subject to specific informational requirements will continue to be required.

The rules have been amended, as previously noted, to make it clear that a person may distribute a filed preliminary proxy statement as soliciting material, so long as no form of proxy is provided prior to the furnishing of a definitive proxy statement.

3. Schedule 14B

In both the original proposals and the reproposals, the Commission solicited comment as to whether Schedule 14B, which provides detailed identification and background information about participants in election contests, should be eliminated. In that event, the information required by the Schedule would have been included in the proxy statement. In response to the original proposals, several commenters supported eliminating Schedule 14B, but the majority of commenters were opposed, with a number suggesting that they were reluctant to support the idea until they knew what other changes to the proxy rules might be contemplated by the Commission in the near future. The reproposals generated significantly fewer comments with respect to this question. Generally, those commenting on the issue supported the elimination of the Schedule without adding to the disclosure provided by the proxy statement, since the information not already in the proxy statement is often of little significance and is alternatively readily obtainable by opposing parties.

In light of the comments received, as well as its own review, the Commission has determined to eliminate Schedule 14B. The provisions of Item 5 of Schedule 14A requiring disclosure of designated Items of Schedule 14B have been amended to restate the substance of those items directly in Schedule 14A. Solicitations commencing prior to the delivery of a proxy statement are required to provide information concerning the participant, pursuant to Rules 14a–11(d) and 14a–12.[51]

4. Immediate Availability of Preliminary Proxy Materials

The original proposals would have eliminated non-public status for all preliminarily filed materials. In response to public comment, the Commission reproposed a scheme whereby material filed in preliminary form with respect to solicitations involving transactional filings that are subject to Item 14 of Schedule 14A (Mergers, Consolidations, Acquisitions and Similar Matters) would be afforded confidential treatment automatically upon request if the transaction had not yet been made public. Under the reproposal, this treatment would extend to information statements filed in preliminary form under similar circumstances. In both cases, the subject transaction would not be entitled to confidential treatment if it was a going-private transaction subject to Rule 13e–3,[52] or a roll-up transaction as defined in Rule 901(c) of Regulation S–K.[53]

The Commission has adopted the amendments to allow for immediate public access to preliminary proxy statements as reproposed, with revisions to the confidential treatment procedure in response to commenters' concerns as discussed below.

A number of institutional investors, legal and academic commenters, and some corporations supported the reproposals. Supportive commenters believed that allowing limited use of preliminarily filed proxy statements would make proxy contests less likely to be affected by pre-clearance delays. Thus, such contests would be more likely to be decided on the merits, after informed shareholder consideration. They argued that final materials usually would not differ greatly from the preliminary materials, and that shareholders would understand that the preliminary materials are subject to change. They also argued that definitive proxy material reflecting staff review would be required prior to a form of proxy being made available.

Many corporate and legal commenters who addressed the issue opposed public access to preliminarily filed materials. Many based their opposition on grounds that it would enable shareholders to attack management proposals before management could explain and defend them. However, under Rules 14a–11 and 14a–12, management and other soliciting parties should have adequate means to address comments directed at statements or proposals contained in their preliminary proxy statements. This is particularly true in light of the elimination of the five-day filing delay, as well as the amendments permitting a solicitation to commence on the basis of the preliminary proxy statement.

Others argued that the public could be misled by relying on information subsequently changed in definitive documents as a result of the review and comment process. Still others believed

[50] 17 CFR 240.14c–5(a).

[51] The disclosure requirement of Rule 14a–11(d) relating to the identity and interests of participants, has been revised in light of the elimination of Schedule 14B to specifically set forth the disclosure required in connection with communications made under that rule.

[52] 17 CFR 240.13e–3.

[53] 17 CFR 229.901(c).

that registrants would be less willing to accept staff comment, since to do so might draw attention to changed passages. As to these last points, the Commission does not believe there is a real difference in this respect between preliminary proxy materials and other documents that are public upon filing, such as registration statements and prospectuses under the Securities Act and periodic reports under the Exchange Act. In each case, staff comment may result in amendments after the filings have been publicly available and disseminated, and may have been relied upon by the market.

Several commenters were of the view that while not burdensome, the proposed requirement that confidential treatment be granted only upon request was not necessary, and suggested that the Commission adopt a bright line test by automatically affording confidential treatment to all preliminarily filed proxy materials, or at least to additional specifically designated types of transactions, either automatically or upon a showing of good cause. In that regard, a number of commenters argued that transactions subject to Rule 13e–3 and roll-up transactions should not be treated differently from other types of extraordinary transactions.

Commenters also raised questions with respect to the provision that confidential treatment be conditioned on the transaction not having been made public. They stated that, as a practical matter, few preliminary proxy statements would be afforded confidential treatment if the proposal were adopted because antifraud considerations under the federal securities laws, self-regulatory organization disclosure policies and good disclosure practices customarily lead to public disclosure about a transaction that is still in the early stages, well before any related proxy material is filed. To condition confidential treatment on not making public disclosure, a commenter argued, would create an "inappropriate disincentive to prompt disclosure." [54]

The Commission has adopted the rules governing public access to and confidential treatment of preliminarily filed proxy and information statements and forms of proxy essentially as reproposed. As noted, the Commission is not convinced that the need for confidential treatment with respect to proxy materials other than those relating to business combinations is any greater than in the case of preliminary prospectuses, Forms 10–K or 10–Q, and tender offers. Under the rules adopted today, all preliminarily filed proxy statements, forms of proxy and information statements will be available to the public upon filing with the Commission, unless the transaction to which the proxy materials relates is encompassed by Item 14 of Schedule 14A. In that case confidential treatment will be granted upon appropriate marking of the filed materials.[55] For the reasons stated by the commenters mentioned above, the language of the rule conditioning confidential treatment on the non-public status of the transaction has been eliminated. Moreover, the necessity of submitting a formal request to the Commission's Secretary has been eliminated; it will be sufficient to mark clearly the filing as nonpublic pursuant to Rule 14a–6(e)(2).

As reproposed, confidential treatment will not be available under the final rules for transactions subject to Rule 13e–3 or for roll-up transactions. The affiliated nature of most of these transactions creates a less compelling need for confidentiality and a concomitantly greater need for disclosure than in the case where management is dealing at arms length with unaffiliated parties.

F. Access to Shareholder Lists

1. Overview

The Commission is adopting revisions to Rule 14a–7,[56] which sets forth the obligations of registrants to either: (1) Provide a requesting shareholder with a list of holders of securities of a class from which proxies have been solicited or are to be solicited on management's behalf in connection with a shareholder meeting or action by consent or authorization; or (2) Mail the requesting shareholder's soliciting materials to shareholders or subgroups of shareholders of that class. As reproposed, registrants retain the option to deliver the shareholder list or mail soliciting materials on behalf of the soliciting shareholder, except where the registrant has commenced a proxy solicitation relating to a roll-up transaction,[57] or a transaction subject to the Commission's going private rule,[58] or has disclosed an intention to commence a solicitation relating to either type of transaction.[59] If the solicitation relates to a roll-up or going private transaction, the list or mailing option shifts to the requesting shareholder due to the extraordinary nature of those transactions, the common conflicts of interest of management, and heightened investor protection concerns.

Shareholder commenters and academics sharply disagreed with the Commission's abandonment of its initial proposal to require access to shareholder lists. These commenters took substantial issue with the corporate community's assertions that state law provisions were adequate, and that the frequency of tactical refusals to provide the list is not significant enough to warrant amending Rule 14a–7 to require equal access to the shareholder list for soliciting shareholders. State law is not adequate, they contended, because it permits companies routinely to abuse shareholder rights by denying requests on insubstantial grounds. This causes shareholders to have to choose between the expense of litigation or forgoing the list to which they are entitled.

Most of the commenters from the corporate and legal community preferred the rule as adopted today over the rule as originally proposed. However, a few of these commenters objected to the provisions governing roll-up and going private transactions and raised questions regarding the Commission's authority to provide shareholders with a federal right of access to the shareholder list in the context of roll-up and going private transactions.

2. Registrant's Obligations

The introductory language of Rule 14a–7 has been revised to clarify that a shareholder's written request for either the shareholder list or mailing of soliciting materials triggers the Rule 14a–7 requirements, even if the request does not explicitly reference Rule 14a–7.[60] The revised rule requires registrants

[54] See letter from the American Bar Association, Federal Regulation of Securities Committee, Subcommittee on Proxy Solicitations and Tender Offers, dated August 31, 1992.

[55] Since confidential treatment will be available only with respect to Item 14 transactions, the appearance on the computer screens in the Commission's public reference room of a preliminary proxy filing may indicate to observers that an extraordinary transaction is pending before the parties to the transaction have otherwise made it public. Therefore, the Commission will not have the preliminary filing appear on the public reference room computer screens.

[56] 17 CFR 240.14a–7.

[57] See Item 901(c) of Regulation S–K, 17 CFR 229.901(c).

[58] Rule 13e–3, 17 CFR 240.13e–3.

[59] Rule 14a–7(b).

[60] See In re The Krupp Companies, Exchange Act Rel. No. 30566 (Apr. 8, 1992). In the *Krupp* order, the Commission also stated that (footnote omitted):

Where a securityholder is deemed to have requested the list under both state and federal law, the registrant must promptly advise the requesting securityholder as to whether it will mail or provide a list under Rule 14a–7, and must not mislead the securityholder as to whether its rights to a list under

Continued

to deliver, within five business days after receipt of a shareholder request, a list or a statement including the following information to the requesting shareholder: notification that the registrant elects to mail the shareholder's soliciting materials; the approximate number of record holders and beneficial holders, separated by type of holder and class, owning securities in the same class or classes of holders solicited by management or any more limited group of such holders designated by the shareholder; and the estimated cost of mailing a proxy statement, form of proxy or other communication to such holders.[61]

The rule as adopted clarifies that a registrant is required to provide information as to subsets of record and beneficial holders targeted by the requesting shareholder, but only to the extent that the information is available or retrievable under the registrant's or its transfer agent's security holder data systems.[62] The time period for furnishing this information was lengthened in response to concerns raised by commenters that a two-business day period would be inadequate. In response to other comments, however, that the requirement that the registrant need only mail the information within the specified period would cause substantial additional delays, the rule has been amended to require actual delivery within five business days.

In addition, at the registrant's option (or requesting shareholder's option in the context of a roll-up or going private transaction), the registrant must either promptly mail the shareholder's material upon receipt of the materials and postage [63] or furnish the requesting shareholder with a shareholder list within five business days of receipt of the initial request. As under the rule prior to revision, the shareholder must reimburse the company for the reasonable expenses incurred by the registrant in performing the obligations specified in Rule 14a–7.

The list information provided to requesting shareholders must be reasonably current and include the names, addresses, and security positions of record holders, including banks, brokers and similar intermediaries, owning securities in the same class or classes as holders solicited by management, or a more limited sub-group as designated by the shareholder. The information also must include a reasonably current list of beneficial owners obtained by the registrant pursuant to Rule 14a–13(b) (the "NOBO/COBO list"),[64] if the registrant has obtained or obtains such a list (or updated list) for its own use prior to the meeting or other shareholder action.

In response to a request for comment, a few commenters addressed whether shareholders should be able to use the NOBO/COBO list to distribute proxy materials directly to beneficial owners and urged that this was an appropriate use of the list. Nothing in the amendments will bar direct dissemination of proxy material to beneficial owners by shareholders or the registrant, so long as adequate disclosure is provided concerning the need for the record holder to execute the proxy.[65]

The list information must be provided in the form (*e.g.*, paper, magnetic tape) requested by the shareholder to the extent that the form is available to the registrant without undue burden or expense. The registrant must update record holder information on a daily basis or at the shortest other reasonable intervals until the record date for the meeting or action.[66]

A number of legal and corporate commenters objected to the requirement that any other information regarding beneficial owners that is in the registrant's possession at the time of the list request that the registrant has used or intends to use to conduct its solicitation in connection with the meeting or action also be furnished to the shareholder. They argued that this requirement was too vague given the many different ways beneficial ownership information is obtained, and the different forms it could take. As a result, the requirement has been eliminated.

Commenters were split on the issue whether a shareholder should have access to beneficial ownership information concerning employee participants. Because disclosure of the identity of employee participants would provide information concerning their employment and not just information related to their shareholdings, the amendments do not provide for the delivery of beneficial ownership information beyond that included in the NOBO/COBO list.

3. Shareholders' Certification

The commenters were equally split on whether beneficial owners should be permitted to invoke Rule 14a–7, with the legal commenters arguing that limiting access to record holders will avoid confusion without imposing any significant burden, and academic and shareholder commenters arguing in favor of beneficial owner access. Since the procedure under Rule 14a–8,[67] under which a beneficial owner may submit a proposal, has proven workable, the amended rule will allow the beneficial owner to make the request as long as adequate documentation of beneficial ownership is provided with the initial request.[68] The documentation of the fact of beneficial ownership will be substantially the same as that required under Rule 14a–8. Documentation of the period of investment will not be required.

Shareholders receiving a list under revised Rule 14a–7 must provide the registrant with a certification identifying the proposal that will be the subject of the shareholder's solicitation or communication and attesting that the shareholder will not: (a) Use the list information for any purpose other than to communicate with or solicit security holders regarding the same meeting or action by consent or authorization for which the registrant is soliciting proxies; nor (b) disclose the list information to any person other than a beneficial owner for whom the list request was made, or an employee or agent to the extent necessary to affect the communication or solicitation.[69] The certification is not filed with the Commission.

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state law have been affected by the registrant's actions under Rule 14a–7. Thus, care must be taken not to mislead the securityholder with respect to the comparability of the information to be provided under Rule 14a–7 and state law. Prompt compliance with Rule 14a–7 is required, even if a concurrent request has been presented to the issuer under state law.

[61] Rule 14a–7(a)(1)(i)–(iii).

[62] Thus, for example, a requesting shareholder could target shareholders with holdings over a specified amount, the largest shareholders who hold in the aggregate a certain specific percentage of the company's stock, shareholders within a specific geographical region, or shareholders who hold as nominees.

[63] Rule 14a–7(a)(2)(i). The registrant no longer will be able to delay mailing a shareholder's soliciting materials pursuant to revised Rule 14a–7 until the earlier of the anniversary date of the mailing of the prior year's proxy statement or the mailing of its own materials, as permitted under the old rule.

[64] 17 CFR 240.14a–13(b).

[65] Registrants nevertheless would be obligated by the shareholder communication provisions of Rule 14a–13(a)(4), 17 CFR 240.14a–13(a)(4), to disseminate proxy materials through the record holders as well.

[66] Rule 14a–7(a)(2)(ii).

[67] 17 CFR 240.14a–8(a)(1).

[68] At least 32 states recognize a statutory or common law right of beneficial owners to request a shareholder list.

[69] Rule 14a–7(c).

Commenters were split on whether the shareholder should be required to return the list after the termination of the solicitation. Since return of the list and destruction of any copies is a requirement of Rule 14d–5,[70] governing delivery of lists in connection with tender offers, a similar provision has been adopted in amended Rule 14a–7.

4. Disclosure of a Registrant's Denial of Shareholder List Requests

The Commission is not adopting proposed amendments to Schedule 14A and Schedule 14C that would have required registrants to provide disclosure regarding shareholder list requests not granted as of the date that the proxy or information statement is disseminated to shareholders.

The comments did not reveal widespread support for this proposal among shareholders. Corporate and legal commenters objected on the grounds that such disclosure would imply wrongdoing or unfair treatment of shareholders by the registrant, even where the registrant may be acting in compliance with Rule 14a–7 or denying a request made for an improper or frivolous purpose. They also argued that this would not materially benefit shareholders, but would increase the length and cost of preparation of the proxy statement.

G. Enhanced Disclosure Regarding Voting Results and Vote Tabulation Policies

1. Voting Results

The Commission proposed to amend Items 4(c) of Forms 10–K and 10–Q to require a brief description of each matter voted upon by shareholders during the period of the report, including contested and uncontested elections, as well as a statement of the number of votes cast for, against, or withheld with regard to each matter or nominee. Similarly, the number of abstentions and broker non-votes also were to be disclosed. Comment for the most part was favorable with respect to these proposals. Because expanded disclosure will provide shareholders with more information regarding the use of the corporate franchise, such as where a significant percentage of votes were withheld by shareholders on an uncontested management slate to express dissatisfaction with management's policies or practices, the Commission has adopted the amendments as proposed. Identical amendments have been made to recently adopted Form 10–KSB and 10–QSB.

2. Vote Tabulation Policies and Procedures

The amendments also codify existing interpretations of Item 21 of Schedule 14A and extend required disclosure to tabulation of votes relating to the election of directors. Revised Item 21 requires that shareholders be furnished with a statement indicating the vote needed for approval, except for votes relating to the approval of auditors. In addition, proxy statements must include a description of the treatment and effect of abstentions and broker non-votes under applicable state law and registrant charter and by-law provisions. The majority of commenters who spoke to the issue were supportive of these changes.

H. Presentation of Matters on the Form of Proxy

Prior to today's amendments, Rule 14a–4(a)[71] required that each matter or "group of related matters" intended to be acted upon be identified in the form of proxy. Rule 14a–4(b)(1)[72] required that the form of proxy provide an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to, each matter or "group of related matters." Where a registrant or other party expressly conditioned the adoption of one matter on the approval of other matters, the matters were not required to be set forth separately on the form of proxy.

In the reproposal, the Commission proposed amendments to Rules 14a–4 (a) and (b)(1) to require that the form of proxy provide for a separate vote on each matter presented. The amendments, adopted as reproposed, will not prohibit the soliciting party from conditioning the effectiveness of any proposal on the adoption of one or more other proposals, if permitted by state law. In such cases, appropriate disclosure will be required to advise shareholders that a vote against one proposal may have the effect of a vote against the group of mutually-conditioned proposals.

Shareholder and academic commenters applauded the Commission's effort to "unbundle" management proposals. Corporate and legal commenters, however, asserted that, while there may be a limited number of cases where proposals are grouped together in such a manner that a shareholder may be obliged to vote in favor of some proposals he or she would otherwise oppose in order to support other, more desirable proposals, there is a legitimate purpose in providing for a single vote on a group of related matters. Those commenters believed that providing shareholders a means to defeat one portion of such a group may be misleading, since it implies that the shareholder has a choice to accept some but not all portions of the grouped proposals. Some commenters also argued against the Commission's proposal, asserting that it intruded into areas traditionally governed by state law.

The Commission has adopted the proposed amendments to Rules 14a–4 (a) and (b)(1). The amendments will allow shareholders to communicate to the board of directors their views on each of the matters put to a vote. Although the board of directors may not be legally obligated to proceed with a favorable proposal after a negative vote on the unpopular portions of the package, and is legally entitled to proceed with the package as a whole once approved despite a significant number of negative votes or abstentions on one of the proposals, it may review those options in light of a significant expression of shareholder sentiment against the package as formulated.

A few commenters questioned whether the Commission has authority to promulgate this rule. Like current Rule 14a–4(b)(2),[73] the amended rule serves not only to ensure informed decisionmaking on each matter presented, but prohibits electoral tying arrangements that restrict shareholder voting choices on matters put before shareholders for approval.

As noted in the reproposing release, nothing in the amendment would prevent a registrant from providing shareholders with the option to vote on the separate proposals as a package by marking a single box as "FOR," "AGAINST," or "ABSTAIN" with respect to all the separate proposals.

I. Amendment to the Bona Fide Nominee Rule

Shareholders under state law generally only can submit one effective proxy in connection with a solicitation. Dissident shareholders seeking to nominate and elect a minority of directors to the board in the past have sought to avoid having to advise shareholders that they may not exercise their full voting power if the shareholder chooses to vote for its nominees, by obtaining authority on the form of proxy to vote for certain of the company's

[70] 17 CFR 240.14d–5(e)(4).

[71] 17 CFR 240.14a–4(a).

[72] 17 CFR 240.14a–4(b)(1).

[73] 17 CFR 240.14a–4(b)(2).

nominees in addition to the shareholder's nominees. The Commission's proxy rules, however, have erected unnecessary impediments to this solution. Rule 14a–4(d) prohibited listing on a form of proxy the names of persons who are not "bona fide nominees." Bona fide nominees are persons who have consented to be named in the proxy statement of the soliciting party and to serve if elected.[74]

Rarely, if ever, do company nominees consent to be named by soliciting shareholders. Consequently, shareholders have been deprived of the opportunity to vote for one or more company nominees on a soliciting shareholder's proxy card, since those persons generally have not consented to be named in the soliciting shareholder's proxy statement.

Throughout the Commission's review of its proxy rules, the difficulty experienced by shareholders in gaining a voice in determining the composition of the board of directors has been highlighted by a number of comment letters and proposals. This issue also has been the subject of congressional proposals for expanded shareholder access to company proxy statements for the purpose of nominating director candidates.

Proposals to require the company to include shareholder nominees in the company's proxy statement would represent a substantial change in the Commission's proxy rules. This would essentially mandate a universal ballot including both management nominees and independent candidates for board seats. However, any such universal ballot is appealing since the shareholder could make such a selection if he or she attended the annual meeting in person.

The Commission's revision of the bona fide nominee rule addressed a more limited problem caused solely by its own rules. Currently, shareholders under state law can nominate and run independently their own nominees. Currently, state law allows shareholders to vote for both company and shareholder nominees, if provided a means to do so on a proxy or by attending the meeting. The Commission's bona fide nominee rule has acted to prevent the form of proxy from being used to allow shareholders to exercise their state law right through the proxy process, and as a result has both cut off shareholder voting rights and greatly disadvantaged shareholder nominees seeking minority representation on the board of directors.

[74] 17 CFR 240.14a–4(d).

In order to remove this purely regulatory impediment to the election of shareholder nominees for directors, the Commission proposed to amend the bona fide nominee rule to provide that the requirement that a nominee consent to be named in the proxy statement would not prevent a person soliciting in support of shareholder nominees who, if elected, would constitute a minority of the board of directors, from providing shareholders an opportunity to vote for the company nominees, provided that company's candidates are clearly distinguished as such. Where, however, an insurgent seeks to elect a majority of the board of directors rather than seek minority representation, the requirement for specific nominee consent to be named and serve will continue.[75] For such insurgents, it is not unduly burdensome to be required to propose a full complement of nominees or bear the obligation to disclose the consequences to shareholders of using the proxy to vote for less than all the director positions up for election.[76]

Corporate commenters vigorously opposed this amendment. They contended that the unauthorized use of the names of company's nominees on soliciting shareholder's proxy cards would imply that the company nominees supported the soliciting shareholder's position, had agreed to be named on the shareholder's card, and would serve along with the shareholder's nominees if elected. They also argued that the use of company nominees' names on both proxy cards would confuse shareholders; one commenter noted that some shareholders who do not read the proxy statement may see some familiar company names on the soliciting shareholder's proxy card and execute it in the mistaken belief that they were executing the company's proxy card.

Moreover, the opposed commenters, a number of whom currently serve as directors of public companies, expressed their strong belief that no one should be forced to lend his or her name, stature, and reputation to the election campaign of a person or persons with whom he or she does not choose to run. Finally, a number of corporate and director commenters argued that minority representation on the board was not a good thing, arguing that the dissension and loss of collegiality likely will make the board less effective. They cited liability concerns and suggested that if the rule was adopted fewer qualified persons would be willing to serve as directors of public companies.

The Commission has determined to adopt the proposal with modifications to address the concerns of commenters with respect to nominees lending their names to a shareholder's solicitation and possible confusion of shareholders. While the revision to the bona fide nominee rule may facilitate the election of shareholder nominees, the possibility of split election results and the potential that a company nominee may be elected with shareholder nominees exists under the current rules, particularly in the case of cumulative voting.[77] The argument that election of shareholder nominees to the board will hinder the board's effectiveness is best made to the shareholders. It should not be a basis for imposing unnecessary regulatory barriers to the full exercise of the shareholder franchise.

While the reproposing release suggested the device as a means to "round out" a short slate, the proposal was not intended as a means to require company nominees to be part of the soliciting shareholder's slate without their consent. Rather, the proposal merely would allow the soliciting shareholder to afford shareholders an opportunity to vote for certain of company's nominees if they chose to vote for shareholder nominees by

[75] Several commenters pointed out that while a shareholder slate may, if elected, represent a minority of the entire board, the slate may represent a majority of the seats up for election, for example, in the case of a staggered or classified board. Conversely, the minority slate, when added to dissident supporters already sitting on the board may represent in the aggregate a majority of the board. The election of the minority slate, therefore, could effect a change of control. Others were concerned that two different minority slates could independently garner enough support to replace management.

The Commission has determined, as proposed, to require only that the director candidates nominated by the shareholder soliciting voting authority if elected constitute a minority of the entire board. The rule would be unduly narrow if it required that dissidents only seek a minority of the seats up for election. In addition, the rule would be unworkable if it turned on which "camp" both sitting directors and nominees belonged to at a particular moment.

[76] The required disclosure includes whether the remaining seats are likely to be vacant or filled by company nominees (often depending on whether the vote requirement for the election of directors is a plurality or majority of votes cast) and that certain company nominees may not serve if elected to an insurgent-controlled board. In addition, any plan to fill any such vacancies on the board must be disclosed.

[77] Of the 17 election contests reviewed by the Institutional Shareholder Services Inc. from January 1, 1991 to July 8, 1991, five resulted in dissidents winning partial representation on the board. Smith & Deal, Special Report, The 1991 Proxy Season, Institutional Shareholder Services, Inc. (1991). For the eight election contests covered between January 1, 1992 and June 30, 1992, four resulted in dissidents winning minority representation on the board. Special Report, The 1992 Proxy Season, Institutional Shareholder Services, Inc. (1992). The data do not include settlements resulting in agreements to place one or more dissident nominees on the board.

executing the soliciting shareholder's proxy card. That opportunity, however, can be afforded without the names of the company nominees being reprinted on the form of proxy or in the soliciting shareholder's proxy statement.

Under the amendment to Rule 14a–4(d) as adopted, a soliciting shareholder would not be precluded by the bona fide nominee rule from undertaking to vote the proxy in favor of the company's nominees, other than those specifically excluded by the soliciting shareholder, so long as shareholders are provided an opportunity specifically to write the names of any other company nominees with respect to whom they wish to withhold voting authority from the proxy holder. The proxy statement and form of proxy will refer the shareholder to management's soliciting materials for the names, background and qualifications of the company nominees. Thus, shareholders will know precisely which company nominees their shares will be voted for by comparing the full company slate with the list of company nominees the proxy holder will not vote for, and by indicating additional company nominees with respect to whom the shareholder wishes to withhold authority. An example of the relevant portions of the resulting form of proxy follows:

Proxy

ABC Corporation

Annual Meeting of Shareholders

This Proxy is Solicited by the Shareholder Committee to Revitalize ABC Corporation

The undersigned hereby appoints Joseph Robert et al. as proxies and revokes any previous proxies with respect to the matters covered by this proxy.

Election of Directors

1. *Shareholder Committee Nominees*—Election of Joseph Robert, Mary White, and Kevin Black.

FOR all nominees [ ]
WITHHOLD AUTHORITY for all nominees [ ]

Instruction: To withhold authority to vote for election of one or more persons nominated by the Shareholder Committee, mark FOR above and cross out name(s) of persons with respect to whom authority is withheld.

2. *Company Nominees*

The Shareholder Committee intends to use this proxy to vote for persons who have been nominated by ABC Corporation to serve as directors, other than the company nominees listed below. You may withhold authority to vote for one or more additional company nominees, by writing the name of the nominee(s) below. You should refer to the proxy statement and form of proxy distributed by the Company for the names, background, qualifications and other information concerning the company's nominees.

There is no assurance that any of company's nominees will serve as directors if any of the Shareholder Committee's nominees are elected to the board.

Company nominees with respect to whom the Shareholder Committee is NOT seeking authority to vote for and WILL NOT exercise any such authority:

Jane Doe, John Jones, Roger Roy

Write in below the names of any additional company nominees for which authority to vote is withheld:

_____

_____

Dated:_____

_____

_____

_____

Signature

With respect to the possibility that the company nominees may not serve if elected with one or more shareholder nominees due to liability or other concerns, this risk again is best addressed through disclosure. The soliciting shareholder will be required to include on the proxy card, as well as in the proxy statement, a legend to the effect that there is no assurance that these nominees will serve as directors if the shareholder's nominees are elected to the board.[78]

J. Shareholder Analysis of Management Performance

In the reproposing release, the Commission requested comment on a proposal that was the subject of a petition for rulemaking submitted to the Commission by the Comptroller of the State of New York, Edward V. Regan. The proposal would have allowed any person or group of persons who has held one-half of one percent or more of the voting power of the stock of a registrant for three or more years to submit a statement to be included in the registrant's proxy statement relating to the selection of directors, setting forth their views on the long-term company performance and the effectiveness of management in promoting the long-term interests of the company and its shareholders. Such statements would have been limited to 700 words, not counting tables, charts or graphs, and if more than three statements were submitted to the registrant in respect of any proxy statement, the three shareholder statements to be included would have been selected by lot.

The proxy rules, as amended today, afford investors ample opportunity to communicate their views to other shareholders. Communications can be made directly to other shareholders by qualifying shareholders with minimal or no filing requirements. Public announcements of shareholder voting intentions and the reasons therefor also are available. Consequently, as suggested by many commenters, the Commission has determined that it is unnecessary to adopt this proposal in light of the other reforms.

K. Technical Amendment to Information Statement Delivery Rule

In January, 1992, the Commission amended the shareholder communications and related rules [79] to implement provisions of the Shareholder Communications Improvement Act of 1990.[80] In connection with the amendments, the first sentence of paragraph (a) of Rule 14c–2, which sets forth information statement delivery requirements, inadvertently was revised in a manner which could have been erroneously construed to mean that the rule extended to meetings of holders of unregistered securities where the registrant had registered a different class of securities under Section 12 of the Exchange Act. That sentence is further amended today to clarify that Rule 14c–2 extends only to meetings of holders of a class of securities registered pursuant to section 12 of the Exchange Act or a class of securities issued by an investment company registered under the Investment Company Act of 1940.

III. Effective Date

The amendments are effective immediately on publication in the **Federal Register**, in accordance with the Administrative Procedure Act, which allows for effectiveness in less than 30 days after such publication, *inter alia*, "as provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d)(3). The Commission has determined that the federal proxy rules have created

[78] Regardless of whether dissidents rely on the amendment to the bona fide nominee rule, management's proxy statement should disclose if any nominee has determined to serve only if the full management slate is elected or would resign in the event one or more persons that were not nominated by management are elected to the board of directors. If informed in a timely manner of the limited degree to which a management nominee has consented to serve if elected, the dissident should likewise disclose that information if it nevertheless proposes to vote for that nominee.

[79] Exchange Act Rel. No. 30147; Investment Company Act Rel. No. 18467 (Jan. 6, 1992) [57 FR 1096].

[80] Pub. L. 101–550, 104 Stat. 2713.

unnecessary regulatory impediments to communication among shareholder and others and to the effective use of shareholder voting rights, and that those impediments should be removed by the regulatory amendments adopted today. There is good cause for the amendments to be become effective immediately on Federal Register publication, in order to remove these unnecessary regulatory burdens as soon as possible and, thus, to achieve the statutory purposes of the Exchange Act.

In addition, most of the amendments to the proxy rules adopted today remove restrictions. Immediate effectiveness will afford shareholders and other eligible persons the opportunity to take immediate advantage of the exemptions afforded by the amendments. Accordingly, immediate effectiveness is in accordance with the Administrative Procedure Act, which allows for effectiveness in less than 30 days after publication, *inter alia*, for a "substantive rules which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. 553(d)(1).

IV. Cost-Benefit Analysis

As noted by many commenters, today's amendments will reduce substantially the costs and burdens that have been imposed on those who wish to communicate with shareholders and others regarding management performance and matters submitted to a shareholder vote. The amendments will result in a cash and manpower savings for all those who no longer will be required to prepare and file proxy materials with the Commission pursuant to the new exemption solicitations not seeking proxy authority; even those who are required to submit a Notice of Exempt Solicitation will have a significantly reduced compliance burden. Costs also will be reduced by the elimination of preliminary filing requirements for all soliciting material other than proxy and information statements, as well as by the changes to the proxy statement delivery requirements. The amendments to the shareholder list provisions should not change substantially the costs or burdens to either the registrant or the requesting party.

While some additional disclosure will be required relating to tabulation procedures and voting results, the overall cost resulting from this change to registrants should be minimal and are outweighed in any event by the benefits to shareholders and investors at large resulting from the enhanced information.

V. Final Regulatory Flexibility Analysis

A final regulatory flexibility analysis has been prepared regarding the amendments in accordance with 5 U.S.C. 604. A copy of the analysis may be obtained by contacting Elizabeth M. Murphy, or James R. Budge, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. The corresponding Initial Regulatory Flexibility Analysis appears at 57 FR 29564 [Rel. No. 34–30849].

VI. Statutory Basis

The amendments to the proxy rules and Forms 10–K, 10–Q, 10–KSB, and 10–QSB are being adopted by the Commission pursuant to Exchange Act Sections 3(b),[81] 13,[82] 14,[83] 15 [84] and 23(a).[85]

List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

VII. Text of the Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 7811(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, and 80b–11, unless otherwise noted.

2. By amending § 240.13e–100 by revising the section heading and General Instructions A.1. and G, to read as follows:

§ 240.13e–100 Schedule 13E–3, Transaction statement pursuant to section 13(e) of the Securities Exchange Act of 1934 and rule 13e–3 (§ 240.13e–3) thereunder.

* * * * *

General Instructions

A. * * *

(1) Concurrently with the filing of preliminary or definitive soliciting materials or an information statement pursuant to Regulations 14A or 14C under the Act;

* * * * *

G. If the rule 13e–3 transaction involves a proxy or an information statement subject to Regulation 14A (§§ 240.14a–1 to 240.14b–1) or Regulation 14C (§§ 240.14c–1 to 14c–101), this Schedule 13E–3 shall be available immediately upon filing such material with the Commission in preliminary form.

* * * * *

3. By amending § 240.14a–1 by revising paragraph (*l*)(2) to read as follows:

§ 240.14a–1 Definitions.

* * * * *

(l) *Solicitation.* (1) * * *

(2) The terms do not apply, however, to:

(i) The furnishing of a form of proxy to a security holder upon the unsolicited request of such security holder;

(ii) The performance by the registrant of acts required by § 240.14a–7;

(iii) The performance by any person of ministerial acts on behalf of a person soliciting a proxy; or

(iv) A communication by a security holder who does not otherwise engage in a proxy solicitation (other than a solicitation exempt under § 240.14a–2) stating how the security holder intends to vote and the reasons therefor, provided that the communication:

(A) Is made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, or newspaper, magazine or other bona fide publication disseminated on a regular basis,

(B) Is directed to persons to whom the security holder owes a fiduciary duty in connection with the voting of securities of a registrant held by the security holder, or

(C) Is made in response to unsolicited requests for additional information with respect to a prior communication by the security holder made pursuant to this paragraph (*l*)(2)(iv).

4. By amending § 240.14a–2 by revising the introductory text of paragraph (b); redesignating paragraphs (b)(1) and (b)(2) as paragraphs (b)(2) and (b)(3), respectively; and adding new paragraph (b)(1) to read as follows:

§ 240.14a–2 Solicitations to which §§ 240.14a–3 to 240.14a–14 apply.

* * * * *

(b) Sections 240.14a–3 to 240.14a–6 (other than 14a–6(g)), 240.14a–8, and 240.14a–10 to 14a–14 do not apply to the following:

(1) Any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or

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[81] 15 U.S.C. 78c(b).
[82] 15 U.S.C. 78m.
[83] 15 U.S.C. 78n.
[84] 15 U.S.C. 78o.
[85] 15 U.S.C. 78w(a).

otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization. *Provided, however,* That the exemption set forth in this paragraph shall not apply to:

(i) The registrant or an affiliate or associate of the registrant (other than an officer or director or any person serving in a similar capacity);

(ii) An officer or director of the registrant or any person serving in a similar capacity engaging in a solicitation financed directly or indirectly by the registrant;

(iii) An officer, director, affiliate or associate of a person that is ineligible to rely on the exemption set forth in this paragraph (other than persons specified in paragraph (b)(1)(i) of this section), or any person serving in a similar capacity;

(iv) Any nominee for whose election as a director proxies are solicited;

(v) Any person soliciting in opposition to a merger, recapitalization, reorganization, sale of assets or other extraordinary transaction recommended or approved by the board of directors of the registrant who is proposing or intends to propose an alternative transaction to which such person or one of its affiliates is a party;

(vi) Any person who is required to report beneficial ownership of the registrant's equity securities on a Schedule 13D (§ 240.13d–101), unless such person has filed a Schedule 13D and has not disclosed pursuant to Item 4 thereto an intent, or reserved the right, to engage in a control transaction, or any contested solicitation for the election of directors;

(vii) Any person who receives compensation from an ineligible person directly related to the solicitation of proxies, other than pursuant to § 240.14a–13;

(viii) Where the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), an "interested person" of that investment company, as that term is defined in section 2(a)(19) of the Investment Company Act (15 U.S.C. 80a–2);

(ix) Any person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities, other than a benefit arising from the person's employment with the registrant; and

(x) Any person acting on behalf of any of the foregoing.

* * * * *

5. By amending § 240.14a–3 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 240.14a–3 Information to be furnished to security holders.

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A (§ 240.14a–101) or with a preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S–4 or F–4 (§ 239.25 or § 239.34 of this chapter) or Form N–14 (§ 239.23) and containing the information specified in such Form.

* * * * *

(f) The provisions of paragraph (a) of this section shall not apply to a communication made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, newspaper, magazine or other bona fide publication disseminated on a regular basis, provided that:

(1) No form of proxy, consent or authorization or means to execute the same is provided to a security holder in connection with the communication; and

(2) At the time the communication is made, a definitive proxy statement is on file with the Commission pursuant to § 240.14a–6(b).

6. By amending § 240.14a–4 by revising the first sentence of each of paragraphs (a)(3) and (b)(1), adding a sentence at the end of paragraph (d)(4), and adding a new paragraph (f), to read as follows:

§ 240.14a–4 Requirements as to proxy.

(a) * * *

(3) Shall identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters, and whether proposed by the registrant or by security holders. * * *

(b)(1) Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon, other than elections to office. * * *

* * * * *

(d)(4) * * * *Provided, however,* That nothing in this section 240.14a–4 shall prevent any person soliciting in support of nominees who, if elected, would constitute a minority of the board of directors, from seeking authority to vote for nominees named in the registrant's proxy statement, so long as the soliciting party:

(i) Seeks authority to vote in the aggregate for the number of director positions then subject to election;

(ii) Represents that it will vote for all the registrant nominees, other than those registrant nominees specified by the soliciting party;

(iii) Provides the security holder an opportunity to withhold authority with respect to any other registrant nominee by writing the name of that nominee on the form of proxy; and

(iv) States on the form of proxy and in the proxy statement that there is no assurance that the registrant's nominees will serve if elected with any of the soliciting party's nominees.

* * * * *

(f) No person conducting a solicitation subject to this regulation shall deliver a form of proxy, consent or authorization to any security holder unless the security holder concurrently receives, or has previously received, a definitive proxy statement that has been filed with, or mailed for filing to, the Commission pursuant to § 240.14a–6(b).

7. By amending § 240.14a–6 by revising the first sentence of the introductory text of paragraph (a); removing paragraphs (b) and (h); redesignating paragraphs (c) through (g) as paragraphs (b) through (f); adding new paragraph (g); redesignating paragraphs (i) through (m) as paragraphs (h) through (*l*); revising the caption to newly redesignated paragraph (b); revising newly redesignated paragraphs (c), (d), and (e); and adding to newly redesignated paragraph (i) a new paragraph (i)(5) before the flush text, to read as follows:

§ 240.14a–6 Filing requirements.

(a) *Preliminary proxy statement.* Five preliminary copies of the proxy statement and form of proxy shall be filed with the Commission at least 10 calendar days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause thereunder. * * *

(b) *Definitive Proxy Statement and Other Soliciting Materials.* * * *

(c) *Personal Solicitation Materials.* If the solicitation is to be made in whole or in part by personal solicitation, eight copies of all written instructions or other material which discusses or reviews, or comments upon the merits of, any

matter to be acted upon and which is furnished to the persons making the actual solicitation for their use directly or indirectly in connection with the solicitation shall be filed with, or mailed for filing to, the Commission by the person on whose behalf the solicitation is made not later than the date any such material is first sent or given to such individuals.

(d) *Release dates.* All preliminary proxy statements and forms of proxy filed pursuant to paragraph (a) of this section shall be accompanied by a statement of the date on which definitive copies thereof filed pursuant to paragraph (b) of this section are intended to be released to security holders. All definitive material filed pursuant to paragraph (b) of this section shall be accompanied by a statement of the date on which copies of such material were released to security holders, or, if not released, the date on which copies thereof are intended to be released. All material filed pursuant to paragraph (c) of this section shall be accompanied by a statement of the date on which copies thereof were released to the individual who will make the actual solicitation or if not released, the date on which copies thereof are intended to be released.

(e) (1) *Public Availability of Information.* All copies of preliminary proxy statements and forms of proxy filed pursuant to paragraph (a) of this section shall be clearly marked "Preliminary Copies," and shall be deemed immediately available for public inspection unless confidential treatment is obtained pursuant to paragraph (e)(2) of this section.

(2) *Confidential Treatment.* If action is to be taken with respect to any matter specified in Item 14 of Schedule 14A (§ 240.14a–101), all copies of the preliminary proxy statement and form of proxy filed pursuant to paragraph (a) of this section shall be for the information of the Commission only and shall not be deemed available for public inspection until filed with the Commission in definitive form, provided that:

(i) The proxy statement does not relate to a matter or proposal subject to § 240.13e–3 or a roll-up transaction as defined in Item 901(c) of Regulation S–K (§ 229.901(c) of this chapter); and

(ii) The filed material is marked "Confidential, For Use of the Commission Only." In any and all cases, such material may be disclosed to any department or agency of the United States Government and to the Congress, and the Commission may make such inquiries or investigation in regard to the material as may be necessary for an adequate review thereof by the Commission.

* * * * *

(g) *Solicitations subject to § 240.14a–2(b)(1).* (1) Any person who:

(i) Engages in a solicitation pursuant to § 240.14a–2(b)(1), and

(ii) At the commencement of that solicitation owns beneficially securities of the class which is the subject of the solicitation with a market value of over $5 million,

Shall furnish or mail to the Commission, not later than three days after the date the written solicitation is first sent or given to any security holder, five copies of a statement containing the information specified in the Notice of Exempt Solicitation (§ 240.14a–103) which statement shall attach as an exhibit all written soliciting materials. Five copies of an amendment to such statement shall be furnished or mailed to the Commission, in connection with dissemination of any additional communications, not later than three days after the date the additional material is first sent or given to any security holder. Three copies of the Notice of Exempt Solicitation and amendments thereto shall, at the same time the materials are furnished or mailed to the Commission, be furnished or mailed to each national securities exchange upon which any class of securities of the registrant is listed and registered.

(2) Notwithstanding paragraph (g)(1) of this section, no such submission need be made with respect to oral solicitations (other than with respect to scripts used in connection with such oral solicitations), speeches delivered in a public forum, press releases, published or broadcast opinions, statements, and advertisements appearing in a broadcast media, or a newspaper, magazine or other bona fide publication disseminated on a regular basis.

* * * * *

(i) *Fees.* * * *

(5) For submissions made pursuant to § 240.14a–6(g), no fee shall be required.

* * * * *

8. By revising § 240.14a–7 to read as follows:

§ 240.14a–7 Obligations of registrants to provide a list of, or mail soliciting material to, security holders.

(a) If the registrant has made or intends to make a proxy solicitation in connection with a security holder meeting or action by consent or authorization, upon the written request by any record or beneficial holder of securities of the class entitled to vote at the meeting or to execute a consent or authorization to provide a list of security holders or to mail the requesting security holder's materials, regardless of whether the request references this section, the registrant shall:

(1) Deliver to the requesting security holder within five business days after receipt of the request:

(i) Notification as to whether the registrant has elected to mail the security holder's soliciting materials or provide a security holder list if the election under paragraph (b) of this section is to be made by the registrant;

(ii) A statement of the approximate number of record holders and beneficial holders, separated by type of holder and class, owning securities in the same class or classes as holders which have been or are to be solicited on management's behalf, or any more limited group of such holders designated by the security holder if available or retrievable under the registrant's or its transfer agent's security holder data systems; and

(iii) The estimated cost of mailing a proxy statement, form of proxy or other communication to such holders, including to the extent known or reasonably available, the estimated costs of any bank, broker, and similar person through whom the registrant has solicited or intends to solicit beneficial owners in connection with the security holder meeting or action;

(2) Perform the acts set forth in either paragraphs (a)(2)(i) or (a)(2)(ii) of this section, at the registrant's or requesting security holder's option, as specified in paragraph (b) of this section:

(i) Mail copies of any proxy statement, form of proxy or other soliciting material furnished by the security holder to the record holders, including banks, brokers, and similar entities, designated by the security holder. A sufficient number of copies must be mailed to the banks, brokers and similar entities for distribution to all beneficial owners designated by the security holder. The registrant shall mail the security holder material with reasonable promptness after tender of the material to be mailed, envelopes or other containers therefor, postage or payment for postage and other reasonable expenses of effecting such mailing. The registrant shall not be responsible for the content of the material; or

(ii) Deliver the following information to the requesting security holder within five business days of receipt of the request: a reasonably current list of the names, addresses and security positions of the record holders, including banks, brokers and similar entities, holding securities in the same class or classes as

holders which have been or are to be solicited on management's behalf, or any more limited group of such holders designated by the security holder if available or retrievable under the registrant's or its transfer agent's security holder data systems; the most recent list of names, addresses and security positions of beneficial owners as specified in § 240.14a–13(b), in the possession, or which subsequently comes into the possession, of the registrant. All security holder list information shall be in the form requested by the security holder to the extent that such form is available to the registrant without undue burden or expense. The registrant shall furnish the security holder with updated record holder information on a daily basis or, if not available on a daily basis, at the shortest reasonable intervals, *provided, however,* the registrant need not provide beneficial or record holder information more current than the record date for the meeting or action.

(b) If the registrant is soliciting or intends to solicit with respect to a proposal that is subject to § 240.13e–3 or a roll-up transaction as defined in Item 901(c) of Regulation S–K [§ 229.901(c) of this chapter], the requesting security holder shall have the option set forth in paragraph (a)(2) of this section. With respect to all other requests pursuant to this section, the registrant shall have the option to either mail the security holder's material or furnish the security holder list as set forth in paragraph (a)(2) of this section.

(c) At the time of a list request, the security holder making the request shall:

(1) If holding the registrant's securities through a nominee, provide the registrant with a statement by the nominee or other independent third party, or a copy of a current filing made with the Commission and furnished to the registrant, confirming such holder's beneficial ownership; and

(2) Provide the registrant with an affidavit, declaration, affirmation or other similar document provided for under applicable state law identifying the proposal or other corporate action that will be the subject of the security holder's solicitation or communication and attesting that:

(i) The security holder will not use the list information for any purpose other than to solicit security holders with respect to the same meeting or action by consent or authorization for which the registrant is soliciting or intends to solicit or to communicate with security holders with respect to a solicitation commenced by the registrant; and

(ii) The security holder will not disclose such information to any person other than a beneficial owner for whom the request was made and an employee or agent to the extent necessary to effectuate the communication or solicitation.

(d) The security holder shall not use the information furnished by the registrant pursuant to paragraph (a)(2)(ii) of this section for any purpose other than to solicit security holders with respect to the same meeting or action by consent or authorization for which the registrant is soliciting or intends to solicit or to communicate with security holders with respect to a solicitation commenced by the registrant; or disclose such information to any person other than an employee, agent, or beneficial owner for whom a request was made to the extent necessary to effectuate the communication or solicitation. The security holder shall return the information provided pursuant to paragraph (a)(2)(ii) of this section and shall not retain any copies thereof or of any information derived from such information after the termination of the solicitation.

(e) The security holder shall reimburse the reasonable expenses incurred by the registrant in performing the acts requested pursuant to paragraph (a) of this section.

9. By amending § 240.14a–11 by removing paragraphs (b) and (c) and redesignating paragraphs (d) through (h) as paragraphs (b) through (f), respectively; removing newly redesignated paragraph (b)(1); redesignating paragraphs (2) through (4) of newly redesignated paragraph (b) as paragraphs (b)(1) through (b)(3); revising the reference "paragraph (d)(2)" to read "paragraph (b)(1)" in newly redesignated paragraph (b)(1); revising newly redesignated paragraphs (b)(2), (b)(3), (c) and (e); and removing the last sentence in newly redesignated paragraph (d), to read as follows:

§ 240.14a–11 Special Provisions Applicable to Election Contests.

* * * * *

(b) *Solicitations Prior to Furnishing Required Written Proxy Statement.*

* * *

(1) * * *

(2) The identity of the participants in the solicitation (as defined in Instruction 3 of Item 4 of Schedule 14A [§ 240.14a–101]) and a description of their interests, direct or indirect, by security holdings or otherwise, are set forth in each communication published, sent or given to security holders in connection with the solicitation.

(3) A written proxy statement meeting the requirements of this regulation is sent or given to security holders solicited pursuant to this paragraph (b) at the earliest practicable date.

(c) *Solicitation prior to furnishing required written proxy statement; filing requirements.* Eight copies of any soliciting material published, sent or given to security holders prior to the furnishing of the written proxy statement required by § 240.14a–3(a) shall be filed with, or mailed for filing to, the Commission no later than the date such material is published, sent or given to any security holder. Three copies of such material shall at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered.

* * * * *

(e) *Application of § 240.14a–6.* The provisions of paragraphs (b), (c), (d), and (e) of § 240.14a–6 shall apply, to the extent pertinent, to soliciting material subject to paragraphs (c) and (d) of this section.

* * * * *

10. By amending § 240.14a–12 by revising paragraphs (a)(3), (a)(4) and (b) to read as follows:

§ 240.14a–12 Solicitation Prior to Furnishing Required Proxy Statement.

(a) * * *

(3) The identity of the participants in the solicitation (as defined in Instruction 3 to Item 4 of Schedule 14A [§ 240.14a–101]) and a description of their interests direct or indirect, by security holdings or otherwise, are set forth in each communication published, sent or given to security holders in connection with the solicitation; and

(4) A written proxy statement meeting the requirements of this regulation is sent or given to security holders solicited pursuant to this section at the earliest practicable date.

(b) Eight copies of any soliciting material published, sent or given to security holders prior to the furnishing of a written proxy statement required by Rule 14a–3(a) [§ 240.14a–3(a)] shall be filed with, or mailed for filing to, the Commission no later than the date such material is published, sent or given to any security holders. Three copies of such material shall at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered.

11. By amending § 240.14a–101 by revising Items 4(a)(2) and 5(a)(2), removing the flush text following 5(a)(2), revising Items 5(b) and 21, and adding Instruction 3 to Item 4 to read as follows:

§ 240.14a–101 Schedule 14A. Information Required in Proxy Statement.

* * * * *

Item 4. Persons Making the Solicitation

(a) * * *

(1) * * *

(2) If the solicitation is made otherwise than by the registrant, so state and give the names of the participants in the solicitation, as defined in paragraphs (a) (iii), (iv), (v) and (vi) of Instruction 3 to this Item.

* * * * *

Instructions

* * * * *

3. For purposes of this Item 4 and Item 5 of this Schedule 14A:

(a) The terms "participant" and "participant in a solicitation" include the following:

(i) The registrant;

(ii) Any director of the registrant, and any nominee for whose election as a director proxies are solicited;

(iii) Any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly takes the initiative, or engages, in organizing, directing, or arranging for the financing of any such committee or group;

(iv) Any person who finances or joins with another to finance the solicitation of proxies, except persons who contribute not more than $500 and who are not otherwise participants;

(v) Any person who lends money or furnishes credit or enters into any other arrangements, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the registrant by any participant or other persons, in support of or in opposition to a participant; except that such terms do not include a bank, broker or dealer who, in the ordinary course of business, lends money or executes orders for the purchase or sale of securities and who is not otherwise a participant; and

(vi) Any person who solicits proxies.

(b) The terms "participant" and "participant in a solicitation" do not include:

(i) Any person or organization retained or employed by a participant to solicit security holders and whose activities are limited to the duties required to be performed in the course of such employment;

(ii) Any person who merely transmits proxy soliciting material or performs other ministerial or clerical duties;

(iii) Any person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or financial adviser, and whose activities are limited to the duties required to be performed in the course of such employment;

(iv) Any person regularly employed as an officer or employee of the registrant or any of its subsidiaries who is not otherwise a participant; or

(v) Any officer or director of, or any person regularly employed by, any other participant, if such officer, director or employee is not otherwise a participant.

Item 5. Interest of Certain Persons in Matters to Be Acted Upon

(a) *Solicitations not subject to Rule 14a–11 (§ 240.14a–11 of this chapter).* * * *

(1) * * *

(2) If the solicitation is made otherwise than on behalf of the registrant, each participant in the solicitation, as defined in paragraphs (a) (iii), (iv), (v), and (vi) of Instruction 3 to Item 4 of this Schedule 14A.

* * * * *

(b) *Solicitation subject to Rule 14a–11 (§ 240.14a–11 of this chapter).* With respect to any solicitation subject to Rule 14a–11 (§ 240.14a–11):

(1) Describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of each participant as defined in paragraphs (a) (ii), (iii), (iv), (v) and (vi) of Instruction 3 to Item 4 of this Schedule 14A, in any matter to be acted upon at the meeting, and include with respect to each participant the following information, or a fair and accurate summary thereof:

(i) Name and business address of the participant.

(ii) The participant's present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment is carried on.

(iii) State whether or not, during the past ten years, the participant has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case. A negative answer need not be included in the proxy statement or other soliciting material.

(iv) State the amount of each class of securities of the registrant which the participant owns beneficially, directly or indirectly.

(v) State the amount of each class of securities of the registrant which the participant owns of record but not beneficially.

(vi) State with respect to all securities of the registrant purchased or sold within the past two years, the dates on which they were purchased or sold and the amount purchased or sold on each such date.

(vii) If any part of the purchase price or market value of any of the shares specified in paragraph (b)(1)(vi) of this Item is represented by funds borrowed or otherwise obtained for the purpose of acquiring or holding such securities, so state and indicate the amount of the indebtedness as of the latest practicable date. If such funds were borrowed or obtained otherwise than pursuant to a margin account or bank loan in the regular course of business of a bank, broker or dealer, briefly describe the transaction, and state the names of the parties.

(viii) State whether or not the participant is, or was within the past year, a party to any contract, arrangements or understandings with any person with respect to any securities of the registrant, including, but not limited to joint ventures, loan or option arrangements, puts or calls, guarantees against loss or guarantees of profit, division of losses or profits, or the giving or withholding of proxies. If so, name the parties to such contracts, arrangements or understandings and give the details thereof.

(ix) State the amount of securities of the registrant owned beneficially, directly or indirectly, by each of the participant's associates and the name and address of each such associate.

(x) State the amount of each class of securities of any parent or subsidiary of the registrant which the participant owns beneficially, directly or indirectly.

(xi) Furnish for the participant and associates of the participant the information required by Item 404(a) of Regulation S–K (§ 229.404(a) of this chapter).

(xii) State whether or not the participant or any associates of the participant have any arrangement or understanding with any person—

(A) with respect to any future employment by the registrant or its affiliates; or

(B) with respect to any future transactions to which the registrant or any of its affiliates will or may be a party.

If so, describe such arrangement or understanding and state the names of the parties thereto.

(2) With respect to any person, other than a director or executive officer of the registrant acting solely in that capacity, who is a party to an arrangement or understanding pursuant to which a nominee for election as director is proposed to be elected, describe any substantial interest, direct or indirect, by security holdings or otherwise, that such person has in any matter to be acted upon at the meeting, and furnish the information called for by paragraphs (b)(1) (xi) and (xii) of this Item.

Instruction: For purposes of this Item 5, beneficial ownership shall be determined in accordance with Rule 13d–3 under the Act (Section 240.13d–3 of this chapter).

* * * * *

Item 21. Voting Procedures. As to each matter which is to be submitted to a vote of security holders, furnish the following information:

(a) State the vote required for approval or election, other than for the approval of auditors.

(b) Disclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as registrant charter and by-law provisions.

§ 240.14a–102 [Removed]

12. By removing § 240.14a–102 (Schedule 14B) and reserving that section.

13. By adding § 240.14a–103 to read as follows:

§ 240.14a–103 Notice of Exempt Solicitation. Information to be included in statements submitted by or on behalf of a person pursuant to § 240.14a–6(g)

U.S. Securities and Exchange Commission
Washington, D.C. 20549

Notice of Exempt Solicitation

1. Name of the Registrant:

2. Name of person relying on exemption:

3. Address of person relying on exemption:

4. Written materials. Attach written material required to be submitted pursuant to Rule 14a-6(g)(1) [§ 240.14a-6(g)(1)].

14. By amending § 240.14c-2 to revise the introductory text of paragraph (a) to read as follows:

§ 240.14c-2 Distribution of Information Statement.

(a) In connection with every annual or other meeting of the holders of the class of securities registered pursuant to section 12 of the Act or of a class of securities issued by an investment company registered under the Investment Company Act of 1940 that has made a public offering of securities, including the taking of corporate action by the written authorization or consent of security holders, the registrant shall transmit a written information statement containing the information specified in Schedule 14C (§ 240.14c-101) or written information statements included in registration statements filed under the Securities Act of 1933 on Form S-4 or F-4 (§ 239.25 or § 239.34 of this chapter) or Form N-14 (§ 239.23 of this chapter), and containing the information specified in such form, to every security holder of the class that is entitled to vote or give an authorization or consent in regard to any matter to be acted upon and from whom proxy authorization or consent is not solicited on behalf of the registrant pursuant to Section 14(a) of the Act, *Provided however*, That:

* * * * *

15. By amending § 240.14c-5 by revising paragraph (d) to read as follows:

§ 240.14c-5 Filing requirements.

* * * * *

(d)(1) *Public Availability of Information.* All copies of material filed pursuant to paragraph (a) of this section shall be clearly marked "Preliminary Copies," and shall be deemed immediately available for public inspection unless confidential treatment is obtained pursuant to paragraph (d)(2) of this section.

(2) *Confidential Treatment.* If action is to be taken with respect to any matter specified in Item 14 of Schedule 14A (§ 240.14a-101), all copies of the preliminary information statement filed pursuant to this section shall be for the information of the Commission only and shall not be deemed available for public inspection until definitive material has been filed with the Commission provided that:

(i) the information statement does not relate to a matter or proposal subject to § 240.13e-3 or a roll-up transaction as defined in Item 901(c) of Regulation S-K (§ 229.901(c) of this chapter); and

(ii) the filed material is marked "Confidential, For Use of the Commission Only." In any and all cases, such material may be disclosed to any department or agency of the United States Government and to the Congress, and the Commission may make such inquiries or investigation in regard to the material as may be necessary for an adequate review thereof by the Commission.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

16. The authority citation for part 249 continues to read as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted.

17. By amending Form 10-Q (§ 249.308a) by revising the introductory text to Item 4, paragraph (c) and Instruction 4 of Item 4 Part II to read as follows:

Note—The text of Form 10-Q does not and this amendment will not appear in the Code of Federal Regulations.

Form 10-Q

* * * * *

Part II

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders

If any matter has been submitted to a vote of security holders during the period covered by this report, through the solicitation of proxies or otherwise, furnish the following information:

* * * * *

(c) A brief description of each matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes, as to each such matter, including a separate tabulation with respect to each nominee for office.

* * * * *

Instructions

* * * * *

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

* * * * *

18. By amending Form 10-QSB (§ 249.308b) by revising the introductory text to Item 4, paragraph (c) and Instruction 4 of Item 4 Part II to read as follows:

Note—The text of Form 10-QSB does not and this amendment will not appear in the Code of Federal Regulations.

Form 10-QSB

* * * * *

Part II

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders

If any matter has been submitted to a vote of security holders during the period covered by this report, through the solicitation of proxies or otherwise, furnish the following information:

* * * * *

(c) A brief description of each matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes, as to each such matter, including a separate tabulation with respect to each nominee for office.

* * * * *

Instructions

* * * * *

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

* * * * *

19. By amending Form 10-K (§ 249.310) by revising paragraph (c) and Instruction 4 of Item 4 of Part I to read as follows:

Note—The text of Form 10-K does not and this amendment will not appear in the Code of Federal Regulations.

Form 10-K

* * * * *

Part I

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders

* * * * *

(c) A brief description of each matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office.

* * * * *

Instructions

* * * * *

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

* * * * *

20. By amending Form 10-KSB (§ 249.310b) by revising paragraph (c) and Instruction 4 of Item 4 of Part I to read as follows:

Note—The text of Form 10-KSB does not and this amendment will not appear in the Code of Federal Regulations.

Form 10–KSB

* * * * *

Part I

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders

* * * * *

(c) A brief description of each matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office.

* * * * *

Instructions

* * * * *

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

* * * * *

By the Commission.

Dated: October 16, 1992.

Jonathan G. Katz,

Secretary.

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